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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~554~~ 23

CHARLES H. STANGE, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JANUARY 3, 1930

CERTIORARI GRANTED MARCH 3, 1930

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SUPREME COURT OF THE UNITED STATES

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[fol. 1]

SUPREME COURT OF THE UNITED STATES

No. 554

CHARLES H. STANGE, Petitioner,

v.

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and Associated Justices of the Supreme Court of the United States:

The petitioner, Charles H. Stange, Merrill, Wisconsin, presents this, his petition for a writ of certiorari to review the judgment of the Court of Claims, rendered on November 4, 1929, dismissing the petition of petitioner, in the action of this petitioner against the United States, No. F-261 of the records of the Court of Claims.

[fol. 2] In this action petitioner seeks the recovery or refunding of income taxes for 1914, assessed by the Commissioner of Internal Revenue against him in 1924, and collected from him in 1925. The Court below made special findings of fact and thereon stated its conclusions of law. Except certain inferences or conclusions from basic facts admitted by both parties to be true, the findings of fact so made are accepted by petitioner.

Accompanying this petition is a certified transcript of the record below, consisting of the pleadings, findings of fact, judgment and opinion of the Court, but not the evidence.

(The italics of this petition, unless otherwise indicated, are ours.)

Summary of Matters Involved

In 1914, A. H. Stange, father of petitioner and a majority stockholder in the A. H. Stange Company (herein referred to as "the Stange Company,") a timber owning lumber manufacturing company, readjusted the ownership

of his stock in that company and his indirect interest in [fol. 3] its assets, by gifts to his children and his sons-in-law. Immediately before this adjustment was made Mr. Stange owned 1780 of the 2500 shares of stock of the Stange Company; after it was made he owned 358 shares, only, the ownership of the remainder of his shares having passed by gift to members of his family (III Findings of Fact).

As a part of this readjustment petitioner received as a gift from his father 237 shares of stock in the Stange Company. As he was previously the owner of 120 shares, his holdings were 357 shares after the readjustment was made, or one-seventh of the total number of shares outstanding (II and III Findings of Fact).

In carrying out his plan of readjustment, Mr. Stange organized two companies (the Union Land Company and the Kinzel Lumber Company, herein referred to as "the new companies,") III Findings of Fact, and caused to be conveyed to them by the Stange Company certain timbered and cut-over lands and other assets theretofore owned by that company. The cost of these assets to the Stange [fol. 4] Company was $619,667.15. Their value on its books of account (inclusive of $800,000 appreciation) was $1,419,667.15 (V Findings of Fact). Upon the conveyance to them of these assets, the new companies raised credits on their books of account in favor of the stockholders of the Stange Company approximately for the total amount for which the assets so received from the Stange Company were entered on their books, $3,796,382.61. This amount, it will be seen, included a large amount of unrealized appreciation. Petitioner's book credits raised by the two companies aggregated $542,000 (IX Findings of Fact).

Petitioner's credits, as well as the credits of the other stockholders, were extinguished by debits to their accounts, for stock and debentures issued to them by the two new companies and for a comparatively small amount of cash paid to them. These debits to petitioner's account equalled the amount of the credits, $542,000 (IX Findings of Fact).

All of the steps to which we have referred were taken, in 1914, in the order stated.

Petitioner's income tax return for 1914 was filed in February, 1915. In November, 1922, long after the bar of the [fol. 5] statute of limitations had become effective, peti-

tioner signed and delivered to the Commissioner of Internal Revenue a waiver of "any and all statutory limitations as to the time within which assessments" might be made against him for 1914 (XI Findings of Fact). No waiver of the statute relating to the period for making collection was ever given by petitioner.

There were no earnings accrued since March 1, 1913, of the Stange Company, available for distribution in 1914. The earnings (gains or profits) of that company accrued prior to March 1, 1913, available for distribution in 1914, were $982,227.93, *which is the entire amount of its accumulated surplus immediately before the conveyance of assets was made by it to the two new companies, after excluding unrealized appreciation of timbered lands* (VI Findings of Fact). The two new companies had no earnings whatsoever available for distribution in 1914. Nevertheless, the Commissioner of Internal Revenue ruled that the transfer of assets by the Stange Company to the new companies, the raising of credits on their books, and the issuance by them in satisfaction thereof of stock and de-
[fol. 6] bentures gave rise to taxable dividends in the aggregate amount of $4,494,968.81, of which $642,138.40, or one-seventh, was ruled to be taxable to petitioner (XII Findings of Fact). This amount was $100,138.40 more than the credits raised by the two new companies in favor of petitioner at the time the assets were conveyed to them by the Stange Company. This determination of petitioner's 1914 tax liability so made by the Commissioner of Internal Revenue was approved by the Court of Claims, in its entirety.

The details of the foregoing steps taken by or at the direction of Mr. A. H. Stange and all figures involved in the case appear in the special findings of fact made by the Court below to which reference is now made.

Upon the hearing of this action in the Court below, petitioner contended that:

1. The present case falls within the principle of the decision of this Court in Lynch v. Turrish, 247 U. S. 221, rather than that of Lynch v. Hornby, 247 U. S. 339. There is, therefore, *no taxable element* in the present case.

[fol. 7] If, however, it be held that the transaction, consisting of the several steps taken by or at the direction of Mr.

A. H. Stange, is a taxable one, it was urged that the amount of income taxable to all stockholders of the Stange Company *may not exceed the amount of the accumulated realized profits* of that company. As stated in the VI Finding of Facts, this amount was $982,227.93, exclusive of unrealized appreciation. The maximum amount taxable to petitioner, upon the application of this principle, would be one-seventh of this amount or $140,318.27.

2. The power *to assess* the alleged deficiency for 1914 expired long prior to February, 1924, when the additional assessment was made. This power could not be and was not revived by the waiver signed by plaintiff and the Commissioner of Internal Revenue in November, 1922, after the bar of the statute had fallen.

No collection waiver was ever given by petitioner. The power *to collect* the alleged deficiency expired long prior to March 19, 1925, the date on which collection was enforced. No liability existed at that time.

3. The several steps taken by Mr. A. H. Stange and the [fol. 8] corporations controlled by him (A. H. Stange Company, Union Land Company, and Kinzel Lumber Company) constitute one transaction, which is *non-taxable gift* from father to son. When so considered, the credits raised by the two new companies on their books in favor of petitioner are non-taxable to the extent of 237/357ths thereof. Nevertheless, the Commissioner held that the amount of the credits was a taxable dividend to the extent of 100% thereof.

4. The Commissioner of Internal Revenue *overstated the amount taxable* to petitioner, even though the transaction be regarded as taxable in its entirety.

In its decision in this case the Court of Claims denied each of the contentions so advanced before it by petitioner. In so doing, the Court below erred as to each contention; and petitioner now submits the foregoing statement of his contentions and the action of the Court thereon as his assignment of errors for purposes of this petition.

Reasons Relied on for the Allowance of the Writ of Certiorari

The reasons for the granting of this application, relied on by petitioner, are these:

(a) The decision of the Court of Claims now sought to be reviewed on the validity of the assessment waiver given [fol. 9] after the bar of the statute of limitations had become effective, is in direct conflict with the decision of the D. C. Court of Appeals in the Joy Floral Company case, 29 Fed. (2d) 865. In fact, this conflict is expressly recognized in the last paragraph but one of the decision of the Court of Claims in the present case. These two Courts are immediately subordinate to this Court. The Court of Appeals of the District of Columbia has, in certain cases, concurrent jurisdiction with the several Circuit Courts of Appeal, of appeals in tax cases from decisions of the Board of Tax appeals. (Section 1002 of the Revenue Act of 1926.)

(b) The decision of the Court below that the assessment waiver served to confer upon the Commissioner of Internal Revenue not only the power *to assess* but also the power *to collect* is in conflict with the underlying principle of decisions of this Court in the New York & Albany Lighterage Company case (273 U. S. 346), and the Benjamin Russell case (278 U. S. 181), and numerous decisions of the Board of Tax Appeals, such as those rendered in the cases of American Powder Mills, 12 B. T. A. 305 and Chicago Insulated Wire and Manufacturing Company, 10 B. T. A. 1195.

[fol. 10] (c) The ruling of the lower Court that as a result of the steps outlined in the findings of fact petitioner received a taxable dividend in the amount of $642,138.40, is in conflict with the decisions of this Court in Mobile and Ohio Railroad Company v. Tennessee, 153 U. S. 486 and Lynch v. Turrish, 247 U. S. 221, and with the implication of the decisions of this Court in the Lynch-Hornby case, 247 U. S. 339, the Phellis case, 257 U. S. 156, and the Rockefeller case, 257 U. S. 176. Each of these cases, except the Mobile and Ohio case, arose under the Revenue Act of 1913.

(d) The present case involves questions of general public interest. Thousands of waivers have been given by taxpayers. These waivers differ in the language they contain. Many of them relate to assessment, only. Some were given before and others after the expiration of the statutory periods. A conflict of authority regarding the validity and effect of these waivers has been created by the decision of the Court of Claims in petitioner's case. The Court of Claims is a court of first instance and its judgments are reviewed only by this court.

[fol. 11] Uncertainty now exists in the minds of taxpayers and officials regarding the rules to be applied in determining the validity or invalidity of waivers. That such uncertainty extends to the Congress of the United States is inferable from the enactment of Section 506 of the Revenue Act of 1928. In fact, that section undoubtedly contemplates that an authoritative ruling shall be made by the Courts on the question of the validity of waivers given after the expiration of the statutory period of limitation. We respectfully suggest that, as conflict in the decisions of the Courts immediately subordinate to this Court, on this question, now exists, only by a decision of this Court of the question may an authoritative ruling be secured.

The premises considered, we respectfully ask for the issuance of a writ of certiorari to review the judgment of the Court of Claims in petitioner's case, and the entry of such orders as may be incidental to that relief.

W. W. Spalding, Counsel for Petitioner, Tower Building, Washington, D. C. Mason, Spalding & McAtee, of counsel.

[fol. 1] IN COURT OF CLAIMS OF THE UNITED STATES

No. F-261

CHARLES H. STANGE,

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On August 16, 1926, the plaintiff filed his original petition.

Subsequently, to wit, on May 11, 1928, the plaintiff, by leave of court, filed his amended petition.

Said amended petition is as follows:

II. Amended Petition—Filed May 11, 1928

The plaintiff, Charles H. Stange, by his attorney, W. W. Spalding, by this, his amended petition herein, respectfully shows:

1. That at all times hereinafter mentioned plaintiff was and is a citizen of the United States and a resident of Merrill, Lincoln County, State of Wisconsin.

2. The plaintiff has a just claim for the recovery of $30,779.76 paid by plaintiff to the Collector of Internal Revenue for the District of Wisconsin, at Milwaukee, Wis- [fol. 2] consin, under protest, on March 19, 1925, as an additional assessment of income taxes determined, assessed, and collected, with interest, by the Commissioner of Internal Revenue of the United States against and from plaintiff for the calendar year ending December 31, 1914. Plaintiff further claims interest at 6 per cent per annum on the said amount of $30,779.76 from March 19, 1925, the date on which payment was made. The provisions of law under which said taxes are alleged to have been assessed, and under which the petitioner claims such refund, are Section, 2, paragraphs A, B, G, and L of the Act approved October 3, 1913 (38 Stat. L., 172), entitled "An Act to Reduce Tariff Duties and to Provide Revenue for the Government and for Other Purposes," and herein referred to as the Revenue Act of 1913.

3. Pursuant to Subdivision A-2 of the Revenue Act of 1913, plaintiff, on or about March 15, 1915, on official form 1040, made to the Commissioner of Internal Revenue his return of net income for the calendar year ending December 31, 1914, for taxes imposed by Subdivisions A-1 and A-2 of the Revenue Act of 1913. In said return plaintiff reported his net taxable income for the calendar year ending December 31, 1914, as $824.08, and the taxes assessable thereon as $8.24, which taxes plaintiff paid thereafter, in 1915, when due.

4. On March 24, 1914, A. H. Stange, then principal owner of the stock of the A. H. Stange Company, of Merrill, Wisconsin, organized the Union Land Company under the laws of Wisconsin. Similarly on May 29, 1914, said A. H. Stange [fol. 3] organized the Kinzel Lumber Company under the

laws of Wisconsin. On May 29, 1914, the said A. H. Stange divided, by gift, his shares of the capital stock of said A. H. Stange Company as follows: He, said A. H. Stange, reapportioned said shares among the members of his family and himself so that, after the reapportionment was complete, one-seventh of the total number of shares outstanding was owned by each of the sons and daughters of said A. H. Stange and one-seventh thereof by himself (said A. H. Stange), except that part of the shares assigned to several of the daughters were in fact transferred to their respective husbands. After such reapportionment was made, to wit, after May 29, 1914, plaintiff held and owned 357 shares of the capital stock of said A. H. Stange Company. The recipients of the stock of said A. H. Stange Company, just named, thereupon subscribed for the capital stock of the Union Land Company and the Kinzel Lumber Company in the same proportions, which stock of the Kinzel Lumber Company was issued on June 1, 1914, and which stock of the Union Land Company was issued on June 2, 1914, in the following amounts: By the Union Land Company stock having a par value of $245,000, and by the Kinzel Lumber Company stock having a par value of $105,000. To the plaintiff was issued stock of the Union Land Company, having a par value of $35,000, and stock of the Kinzel Lumber Company, having a par value of $15.000 total par value of the stock of the two companies $50,000.

5. On May 29, 1914, when the stock of the A. H. Stange Company was so reapportioned by A. H. Stange to himself [fol. 4] and members of his family, the A. H. Stange Company had a surplus of $4,852,529.59, of which $824,189.93 only was earned surplus, and the remainder represented appreciation of timber and timber lands accrued before and existing at March 1, 1913. The status of the surplus of said A. H. Stange Company at June 10, 1914, was the same. The appreciation in the surplus figures is based on the value of the timber at March 1, 1913, determined by the engineers of the Bureau of Internal Revenue. There was no diminution of such value between March 1, 1913, and any date in 1914 or thereafter. After the plaintiff acquired his stock in the A. H. Stange Company, as aforesaid, the said A. H. Stange Company, in partial liquidation of its assets, conveyed a large portion of such assets to the said Union Land

Company and the said Kinzel Lumber Company. This conveyance was made on June 10, 1914, by the A. H. Stange Company directly to the Union Land Company and the Kinzel Lumber Company, without any title or ownership having passed to plaintiff and/or other stockholders of any of the companies named.

6. On July 1, 1914, the said Union Land Company issued to plaintiff and its other stockholders, in proportion to their stockholdings, debenture notes in the amount of $3,185,000; and on the same day the said Kinzel Lumber Company issued to plaintiff and its other stockholders, also in proportion to their stockholdings, debenture notes in the amount of $140,000. Of such notes so issued by the two companies plaintiff received notes having a face value of $475,000, this [fol. 5] amount being one-seventh thereof. To this amount the Commisioner of Internal Revenue added $167,138.40, to represent the value of the stock of the two companies, Union Land Company and the Kinzel Lumber Company, acquired by plaintiff, as above stated, and ruled that the sum of these two amounts, aggregating $642,138.40, constituted taxable income to plaintiff for 1914, under Subdivision B of the Revenue Act of 1913. In so holding, the Commissioner of Internal Revenue erred, because:

(a) Said distributions by the Union Land Company and the Kinzel Lumber Company represented a liquidation, not of earnings or profits, but of their respective paid-in surpluses, based on the value of said assets conveyed to these companies by the A. H. Stange Company, as above stated, at the date of such conveyances, to wit, June 10, 1914.

Immediately prior to the issuance of said debentures, the paid-in surplus resulting from such conveyances were: Of the Union Land Company, $3,909,968.81; and of the Kinzel Lumber Company, $130,000. Neither of these companies then had any earned surplus or undivided profits whatsoever. These paid-in surplus figures are based on the value of the tangible assets at March 1, 1913, determined by the engineers of the Bureau of Internal Revenue. There was no diminution of such value between March 1, 1913, and any date in 1914 or thereafter.

(b) Said debentures did not represent in whole or in part earnings of the issuing companies, or either of them, made

[fol. 6] after February 28, 1913; and the debentures received by plaintiff were less in par value and in actual value than the plaintiff's capital interest in the shares of stock owned by him, immediately prior to their issuance and at all times after said conveyances had been made to the issuing companies by the A. H. Stange Company, as aforesaid.

(c) Said debentures were based wholly on said assets conveyed to the issuing companies by the A. H. Stange Company, as above stated, the value of which, except to the extent of $824,189.93 (the earned surplus of the A. H. Stange Company), represented appreciation of land and timber accrued before and existing at March 1, 1913.

(d) Said distributions did not result in the receipt by plaintiff of income taxable under the Revenue Act of 1913. Whatever value inhered at any time in the stock of the Kinzel Lumber Company and Union Land Company, received by plaintiff as aforesaid, represented a gift to plaintiff from his father, A. H. Stange; and whatever value inhered at any time in said debenture notes, received by plaintiff as aforesaid, represented also a gift to plaintiff from his father, A. H. Stange. Neither of such values constituted taxable income when received.

7. On November 10, 1922, plaintiff signed and gave to the Collector of Internal Revenue a Waiver of the statute of limitations relating to the period in which assessments might be made for 1914. On January 21, 1924, plaintiff was [fol. 7] notified by the Commissioner of Internal Revenue that an additional assessment of income taxes for 1914 in the amount of $28,992.55, based on the erroneous ruling set forth in the next preceding paragraph hereof, would be made; and such additional assessment was in fact made on or about February 23, 1924. The plaintiff, on or about March 1, 1924, duly filed with said collector for presentation to said Commissioner, on official Form 47, a claim for the abatement of said additional assessment, but said Commissioner rejected said claim for abatement and so notified the plaintiff on or about November 20, 1924.

8. Subsequent to the rejection of said claim for abatement, to wit, on March 11, 1925, said Collector of Internal Revenue made a second demand for the payment of said additional assessment for 1914 and interest, aggregating

$30,779.76, viz $28,992.55, the additional assessment for 1914, and $1,787.21 interest thereon.

9. The plaintiff was then compelled to pay, and did pay, on March 19, 1925, to said Collector of Internal Revenue, the said additional assessment plus interest, the total additional payment being $30,779.76. Said additional payment was made under threat by said collector to seize and sell the plaintiff's property if he failed to make such payment and in the belief that such threats would be carried out. At the same time said payment was so made, plaintiff filed with the said Collector of Internal Revenue a written protest, to the effect that said payment was not legally due from plaintiff, and that said additional assess-
[fol. 8] ment had been erroneously, illegally, and wrongfully made.

10. On information and belief, the plaintiff avers that his taxes so paid by plaintiff to the said Collector of Internal Revenue were thereafter by him turned over and deposited in the Treasury of the United States in the usual course of his official business.

11. On March 29, 1926, plaintiff duly filed with the Collector of Internal Revenue, for transmission to the Commissioner of Internal Revenue, a claim for refund of $30,779.76, with interest, which claim was based on the payment of such additional assessment for 1914, and the erroneous finding of the Commissioner of Internal Revenue that plaintiff received taxable income in the amount of $642,138.40 in the form of stock and debentures of the Union Land Company and the Kinzel Lumber Company, the two Wisconsin corporations.

12. On May 12, 1926, the plaintiff's said claim for refund was rejected and denied by the Commissioner of Internal Revenue, and the sum of $30,779.76 is now wrongfully and unlawfully retained and withheld from the plaintiff without his consent and against his will by the United States.

13. Plaintiff's original petition was duly and properly verified by the plaintiff on the 30th day of July, 1926.

14. That, since the filing of said original petition, new matters have arisen which give to plaintiff additional

[fol. 9] grounds and reasons for claiming a refund of the taxes paid to wit, the statute of limitations.

15. Not waiving the grounds for refund, as alleged in the original petition, but relying thereon, plaintiff claims the refund of said taxes on the following further grounds:

16. That said amounts of $28,992.55 and interest of $1,787.21 are alleged to be a deficiency in tax and interest thereon for the calendar year 1914. That said alleged deficiency in tax for the year 1914 was not discovered or assessed by the Commissioner of Internal Revenue within three years or five years after the return was filed. That shortly before the 8th day of November, 1922, to wit, earlier in 1922, the Commissioner of Internal Revenue made the erroneous determination that an alleged deficiency in tax was due from the petitioner for the calendar year 1914; and notwithstanding no assessment had been made thereof, and notwithstanding the time for making any assessment or instituting proceedings by distraint or action in court to collect the same had expired, the Commissioner requested the plaintiff to sign, and plaintiff did sign, a paper writing which purports to waive any and all statutory limitations as to the time within which assessments based upon income tax liabilities for the years 1914 and 1917, determined under the Revenue Act of 1913, the Revenue Act of 1916 as amended by the Revenue Act of 1917, might be entered. An exact copy of said paper writing of November 14, 1922, is attached hereto and marked "Exhibit A" for identification.

[fol. 10] 17. That said paper writing of November 14, 1922, Exhibit A, is designated by the Commissioner of Internal Revenue as an "unlimited waiver," and there was included in said writing the years 1914 and 1917. That on or about April 11, 1923, the Commissioner of Internal Revenue promulgated a ruling, known as IT-4-822, Mim. 3085, published in Cumulative Bulletin of Internal Revenue Rulings, II-1, page 174, which reads as follows:

"To collectors of internal revenue, internal revenue agents in charge, and others concerned:

"The form of waiver now in use extends the time in which assessments of 1917 income and excess-profits taxes may be made to one year from the date of signing by the

taxpayer. Inasmuch as there are many waivers on file signed by taxpayers containing no limitation as to the time in which assessments for 1917 may be made, all such unlimited waivers will be held to expire April 1st, 1924.

(Signed) D. H. Blair, Commissioner."

18. That, in accordance with the ruling of the Commissioner, the said paper writing of November 14, 1922, which purports to be an unlimited waiver, expired on April 1, 1924. That prior to the execution of said paper writing of November 14, 1922, the time within which any assessment and/or proceeding by distraint or otherwise could be made or instituted for the collection of alleged additional income taxes for the year 1914 had expired, under the provisions [fol. 11] of Section 250 (d) of the Revenue Act of 1921, and therefore said writing was unavailing for any purpose. But, if it can be said that said paper writing of November 14, 1922. revived the right to enforce collection of an additional assessment for 1914 (which plaintiff denies), no proceeding or step for the collection of said additional assessment was initiated or taken within the period of the reviver so fixed by Mim. 3085, supra; and, inasmuch as said waiver expired on April 1, 1924, and has never been revived or extended, no authority for enforcing collection of said additional assessment existed on March 19, 1925. Said paper writing, also, by its terms, was limited to an extension of the assessable period. It did not extend the period for enforcing collection of the additional assessment made against plaintiff, as aforesaid, for 1914. Therefore, long before proceedings were initiated against petitioner, as stated in paragraphs 8 and 9 hereof, the right to make or enforce collection of said additional assessment for 1914 was extinguished by the statute of limitations. Collection, however, was enforced by the Collector of Internal Revenue; and, therefore, plaintiff now seeks the recovery of the amount so unlawfully exacted and collected of him, viz, $30,779.76, with interest.

19. That on or about the 25th day of June, 1927, and within four years after the collection and payment of said taxes and interest, as aforesaid, the plaintiff filed with the Collector of Internal Revenue for the District of Wisconsin, at Milwaukee, an amended and supplemental claim for the

[fol. 12] refund of said taxes and interest, in which claim plaintiff alleged as follows:

"On or before March 15, 1915, claimant duly filed his income tax return for the calendar year 1914 with the Collector of Internal Revenue. In February, 1924, an alleged deficiency of income taxes for 1914, in the amount of $28,992.55, was assessed against claimant by the Commissioner of Internal Revenue. On March 11, 1925, more than five years after the filing of the return, collection proceedings, to enforce collection from claimant of said alleged deficiency, with interest, were initiated and prosecuted by the official representatives of the Bureau of Internal Revenue. In obedience to such collection proceedings and to avoid distraint proceedings and the steps to be taken thereunder, including the summary seizure and sale of his property, on March 19, 1925, claimant paid under protest said alleged deficiency of $28,992.55, with interest of $1,787.21, total, $30,779.76. Long prior to the initiation of said collection proceedings, the tax liability represented by said alleged deficiency assessment for 1914 and all interest thereon had been extinguished by the bar of the statute of limitations; and at the time collection was so enforced by said proceedings such liability did not exist. Nevertheless, claimant was compelled to make payment of said alleged deficiency, with interest, on March 19, 1925, to avoid distraint proceedings and the aforesaid steps thereunder, following collection proceedings initiated by the Bureau of Internal Revenue more than five years after the filing of the said return for 1914. Collection proceedings and actual collection were [fol. 13] therefore unwarranted.

"Said alleged deficiency assessment of February, 1924, for the calendar year 1914, was made under a waiver of the limitation period for making additional assessments, signed and given by claimant in November, 1922. Upon information and belief, claimant asserts that such waiver was invalid and conferred no rights upon the Commissioner of Internal Revenue to make the said alleged deficiency assessment for this reason, among others: The right to make said alleged deficiency assessment was barred and extinguished by the statute of limitations prior to the time the waiver was given, and such right being then so barred and

extinguished, could not be revived by a waiver or even an agreement of the parties in interest.

"For these reasons claimant asks for the refunding to him of the amount so collected, $30,779.76, with interest."

20. That more than six months has expired since the filing of said amended and supplemental claim for refund, and no decision has been rendered thereon by the Commissioner of Internal Revenue. That plaintiff has exhausted his remedies before the Treasury Department, Bureau of Internal Revenue, for the refund of the amount of said additional assessment, and now comes into this Honorable Court and sues the United States for the amount unlawfully exacted of him. That the collection from plaintiff, on March 19, 1925, of said amount of $28,992.55, as alleged taxes for the calendar year 1914, and interest of $1,787.21, was erroneous and illegal, and, under the provisions of [fol. 14] Sections 3220 and 3226 of the Revised Statutes, as amended, should be refunded to plaintiff.

21. Plaintiff has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against such government, and is and always has been the sole and absolute owner of the claim here presented, and has made no transfer or assignment of said claim or of any part thereof or of any interest therein, and is justly entitled to the amount claimed from the United States, after allowing all just credits and set-offs, and no other action than as aforesaid has been had on this claim in Congress or by any of the departments.

22. The plaintiff believes the facts as hereinabove stated to be true.

Wherefore plaintiff prays judgment against the United States of America, upon the facts and law, for $30,779.76, with interest at the rate of 6 per cent per annum from March 19, 1925, until paid, and for all other proper relief.

Charles H. Stange, W. W. Spalding, R. A. Littleton, Attorneys for Plaintiff, Woodward Building, Washington, D. C.

[fol. 15] *Duly sworn to by Charles H. Stange. Jurat omittel in printing.*

[fol. 16] EXHIBIT "A" TO AMENDED PETITION

Waiver

Mr. C. H. Stange, of Merrill, Wisconsin, in consideration of the assurance given him by officials of the Income Tax Unit of the Bureau of Internal Revenue that his liability for all Federal taxes imposed by the Act of Congress, approved October 3, 1913, and also by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress, approved October 3, 1917, on his net income received from all sources in the year ended December 31, 1914, and in the year ended December 31, 1917, respectively, shall not be determined except after deliberate, intensive and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that the above-named individual does not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against him for the said years by the officials of the Income Tax Unit.

(Signed) C. H. Stange.

Merrill, Wis., Nov. 10, 1922.
Approved March 16, 1923.
D. H. Blair, Commissioner of Internal Revenue.

[fol. 17] III. GENERAL TRAVERSE—Filed June 20, 1928.

And now comes the Attorney General, on behalf of the United States, and answering the amended petition herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

IV. ARGUMENT AND SUBMISSION

On May 9, 1919, this case was argued and submitted on merits by Mr. W. W. Spalding, for the plaintiff, and by Mr. J. H. Sheppard, for the defendant.

[fol. 18] V. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Green, J.**—Filed November 4, 1929

This case having been heard by the Court of Claims, the Court, upon the evidence adduced, makes the following

SPECIAL FINDINGS OF FACT

I

On February 19, 1915, plaintiff made a return of taxable income in the amount of $824.08 for the calendar year 1914 for taxes imposed by the revenue act of 1913, and thereon paid income taxes of $8.24.

II

In the early part of 1914, and prior to March 24, 1914, plaintiff's father, A. H. Stange, a citizen and resident of Merrill, Wisconsin, decided to divide the greater part of his property with his two sons and his four daughters and their husbands. He was at said time the owner of 1,780 of the 2,500 shares of the outstanding stock of the A. H. Stange Company, a corporation.

The organization of the Union Land Company and the Kinzel Lumber Company by Mr. Stange in 1914, the transfer of assets to these companies by the A. H. Stange Company and the issuance by the Union Land Company and the Kinzel Lumber Company of stock and debentures to their stockholders, including plaintiff, as set forth in these findings, were in accordance with directions given by A. H. Stange and by mutual consent of all parties concerned.

III

In accordance with the plans so formulated by A. H. Stange, on March 24, 1914, he organized the corporation, Union Land Company, under the laws of the State of Wisconsin. On May 29, 1914, he organized the corporation Kinzel Lumber Company, under the laws of the same State.

On this last named date, May 29, 1914, the capital stock of the A. H. Stange Company, consisting of 2,500 shares of the par value of $100 each, was reapportioned by A. H. Stange between himself and his children in such manner as to give to himself and each of his sons and daugthers (and/or daughters and sons-in-law) one-seventh of such total of 2,500 shares. Such reapportionment represented gifts by A. H. Stange to his sons, daughters, and sons-in-law, in the proportions hereafter stated.

[fol. 19] The ownership of the capital stock of the A. H. Stange Company immediately prior and subsequent to this reapportionment was as follows:

Stockholders in A. H. Stange Company

	Before May 29, 1914	After May 29, 1914
A. H. Stange, father	1,780	358
C. H. Stange, son (plaintiff)	120	357
Aug. J. Stange, son	120	357
Chas. H. Kinzel, son-in-law	120	178
Mrs. C. H. Kinzel, daughter	....	179
E. W. Ellis, son-in-law	120	178
Mrs. E. W. Ellis, daughter	....	179
Fred W. King, son-in-law	10	10
Mrs. F. W. King, daughter	110	347
Mrs. R. M. Rogers, daughter	120	357
Total	2,500	2,500

The 120 shares of stock owned by plaintiff prior to such reapportionment were acquired by him by gift from his father, A. H. Stange, 1 share in 1897 and 119 shares in 1902.

On May 29, 1914, the stockholders of the A. H. Stange Company subscribed for the capital stock of the Union Land Company and the Kinzel Lumber Company in the same proportions as they owned stock in the A. H. Stange Company immediately after the reapportionment. The stock of the Kinzel Lumber Company was issued on June 1, 1914, and that of the Union Land Company on June 2, 1914, in the following amounts: By the Union Land Company, stock having a total par value of $245,000; and by

the Kinzel Lumber Company, stock having a total par value of $105,000. To plaintiff was issued stock of the Union Land Company having a par value of $35,000 and stock of the Kinzel Lumber Company having a par value of $15,000, being one-seventh of the issued stock of each company, the total par value of the stock of the two companies thus issued to plaintiff being 50,000. All of the certificates of stock so issued by both the Union Land Company and the Kinzel Lumber Company to plaintiff and the other stockholders of these corporations contained a provision that the stock could not be sold without first being offered for sale at par to the corporations, respectively, issuing same.

IV

The following appears in the minutes of a special meeting of the directors of the A. H. Stange Company held at Merrill, Wisconsin, on June 1, 1914:

"To carry into execution the plan for a long time under consideration to discontinue A. H. Stange Co. holdings of cut-over and timbered lands as well as its logging operations, it was moved, seconded, and unanimously carried—

"1. That the following accounts as they will appear on the books of this company as of June 10, 1914, be closed, to wit:

"Pine lands.
"Lincoln County lands.
"General log equipment.
"Camp Pellegrin.
"Camp No. 2.

[fol. 20] "2. That the values, set up opposite the said accounts as they will appear on June 10, 1914, together with the sum of $60,000.00 in cash, be charged against surplus account.

"3. That the officers of this company be and they are hereby authorized to give by proper deeds of conveyance to Union Land Co. (a corporation of Merrill, Wis., composed exclusively of the stockholders of A. H. Stange Co., the respective interests of the stockholders in Union Land

Company being equal to their present pro rata holdings in A. H. Stange Co.) all real estate and personal property represented by the above-named accounts together with the sum of $60,000.00 in cash.

"4. That on June 10, 1914, the sum of $300,000.00 be charged against surplus account and cash or its equivalent be given to Kinzel Lbr. Co., a corporation of Merrill, Wisconsin (comprised of the stockholders of A. H. Stange Co., the interests of the stockholders in both corporations being proratably equal)."

V

Thereafter, to wit, on June 10, 1914, the A. H. Stange Company transferred to the Union Land Company cash in the amount of $60,000 and other property consisting of logging equipment and railroads, cut-over lands, and timberlands having a book value of $1,059,667.15, a total of $1,119,667.15. On the same date, June 10, 1914, the A. H. Stange Company also transferred to the Kinzel Lumber Company cash and notes receivable in the amount of $300,000, and one parcel of real estate not carried on the books of the A. H. Stange Company but having a value of $5,000.

Prior to such transfers by the A. H. Stange Company to the Union Land Company and the Kinzel Lumber Company said A. H. Stange Company was engaged in the manufacture of lumber and other wood products from its own timber. In connection with such operations it owned, prior to said transfers, logging railroads and equipment and conducted logging operations in the timber it owned. By said transfers to the Union Land Company and the Kinzel Lumber Company the A. H. Stange Company divested itself of all its logging equipment, railroads, cut-over lands and timberlands, and thereafter confined itself to manufacturing operations from timber purchased from others.

VI

The records and books of account of the A. H. Stange Company reflect the following facts:

Surplus, March 1, 1913	$1,842,872.70
Dividend distribution, July 19, 1913	37,500.00
Dividend distribution, Aug. 12, 1913	25,000.00
Net earnings, 1913	28,855.23
Surplus, December 31, 1913	1,807,227.93
Dividend distribution, Jan. 19, 1914	25,000.00
Surplus, June 10, 1914, before transfers	1,782,227.93
Surplus, June 10, 1914, after transfers	362,560.78
Net operating loss, 1914	91,718.64
Surplus, December 31, 1914	270,842.14

[fols. 21 & 22] The debits to the surplus account of June 10, 1914, to represent the said transfer of assets by the A. H. Stange Company to the Union Land Company and the Kinzel Lumber Company were as follows:

For assets transferred to:	
Union Land Company	$1,119,667.15
Kinzel Lumber Company	300,000.00
	1,419,667.15

The income-tax return of the A. H. Stange Company for 1914 showed a net operating loss of the amount above stated, $91,718.64.

Included in each of the above surplus figures, as of March 1, 1913, December 31, 1913, June 10, 1914, and December 31, 1914, was $800,000 of appreciation. On June 30, 1906, the book account entitled "pine lands" was debited with $800,000, and the same amount was credited to the surplus account, to represent appreciation of the company's pine lands from date of acquisition (which went back as to some of the lands to 1895) to the date of the entry. Excluding such appreciation, the surplus account of the A. H. Stange Company showed credit balances on the several dates antecedent to the transfers, as follows:

March 1, 1913	$1,042,872.70
December 31, 1913	1,007,227.93
June 10, 1914, before transfers	982,227.93

The net cost to March 1, 1913, of the lands and timber of the A. H. Stange Company owned on that date was $356,-

397.30. The book value on that date, which included the appreciation item of $800,000 was $1,156,397.30. The net cost on June 10, 1914, of the lands and timber owned by the A. H. Stange Company on that date, prior to said transfers, was $236,351.41. Including the appreciation item the book value was $1,036,351.41. The book value of the other assets transferred to the Union Land Company on June 10, 1914, as aforesaid was as follows:

General logging equipment	$15,944.13
Camp No. 2	1,371.61
Camp Pellegrin	6,000.00
Cash	60,000.00

VII

Immediately after the transfer of assets by the A. H. Stange Company to the Union Land Company, as above stated, the property so transferred was appraised and entered on the books of the Union Land Company at a value of $3,431,382.61. The lands so transferred consisting of cut-over lands and timberlands had been acquired by the A. H. Stange Company between the date of its organization in 1895 and the date of said transfer, June 10, 1914.

Thereafter, and prior to September 9, 1921, the Union Land Company submitted to the Bureau of Internal Revenue an answered questionnaire relating to the value of said timber and timbered lands as of June 10, 1914, wherein it was stated that the fair market value on June 10, 1914, of said landed properties was not less than $4,512,137.95. Upon consideration of the information contained in said [fol. 23] answered questionnaire, engineers of the Bureau of Internal Revenue, under date of September 9, 1921, approved a value of said landed properties of $4,129,968.81. Upon the basis of these various valuations of said timber and timbered lands, the fair market value on June 10, 1914, of the total amount in cash and property transferred by the A. H. Stange Company to the Union Land Company on that date was as follows:

Value set up on the books of the Union Land Company June 10, 1914	$3,491,382.61
Value claimed in questionnaire	4,572,137.95
Value approved by engineers of the Bureau of Internal Revenue September 9, 1921	4,189,968.81

The property so transferred by the A. H. Stange Company to the Kinzel Lumber Company on June 10, 1914, pursuant to the resolution above quoted, consisted of $300,000 in cash and notes receivable and one piece of real estate having a fair market value of $5,000, such real estate not having been carried upon the books of the A. H. Stange Company, making a total value of property transferred to the Kinzel Lumber Company of $305,000.

VIII

On July 1, 1914, the Union Land Company issued to plaintiff and its other stockholders noninterest-bearing debenture notes, which notes were issued by said company to its stockholders in proportion to their stockholdings, in the aggregate amount of $3,185,000; and on the same day the said Kinzel Lumber Company likewise issued to plaintiff and the other stockholders, also in proportion to their stockholdings, debenture notes in the amount of $140,000.

IX

The account of plaintiff on the books of the Union Land Company shows the following:

That on June 13, 1914, he, plaintiff, was credited with $497,000, representing his proportionate share of the appraised value of the assets transferred to the Union Land Company by the A. H. Stange Company as described above; that on the same date he withdrew $5,000 in cash which was debited to this account; that on the same date there was issued to him capital stock of the Union Land Company of the total par value of $35,000, which was also debited to this account; that on June 16, 1914, he withdrew cash in the further sum of $2,000 which was debited to his account, and that on July 23, 1914, there was issued to him debenture notes as above described in the sum of $455,000, which sum extinguished the balance standing to his credit in this account.

The account of plaintiff on the books of the Kinzel Lumber Company shows the following:

That on June 2, 1914, he, plaintiff, was credited with $45,000, representing his proportionate share of the value of the assets transferred to the Kinzel Lumber Company

by the A. H. Stange Company as described above; that on the same date there was issued to him capital stock of the Kinzel Lumber Company of the par value of $15,000 which was debited to this account; that on June 11, 1914, he withdrew cash in the sum of $10,000, this amount also being debited to this account; and that on July 15, 1914, there [fol. 24] was issued to him debenture notes as above described in the sum of $20,000, which sum extinguished the balance standing to his credit in this account.

The debenture notes of the Union Land Company and the Kinzel Lumber Company, respectively, above described, were authorized to be issued by resolutions adopted by the officers and directors of these two companies at corporate meetings held on the 27th day of June, 1914.

X

The conveyances referred to in the foregoing findings were made on June 10, 1914, by the A. H. Stange Company directly to the Union Land Company and the Kinzel Lumber Company without any intermediate transfer made through or to any of the stockholders of said companies. The evidence does not show any contract or agreement for these transfers, but the circumstances in relation to the transfer of property from the A. H. Stange Company to the other two corporations named show that the transfer thereof and the subsequent proceedings recited in the findings with relation to the Union Land Company and the Kinzel Lumber Company, their stocks, stockholders, entries on their books, cash disbursements, issue of debenture notes, and other matters pertaining thereto were made by mutual consent without formal contract by reason of family relationship and were all part of one transaction which resulted in the distribution of a part of the surplus of the A. H. Stange Company in the manner shown in the foregoing findings.

XI

On or about November 14, 1922, plaintiff executed and filed with the Bureau of Internal Revenue, a written waiver, which was approved and accepted in writing by the Commissioner of Internal Revenue on or about March

16, 1923, which instrument is in words and figures as follows:

"C. H. Stange, of Merrill, Wisconsin, in consideration of the assurance given him by officials of the Income Tax Unit of the Bureau of Internal Revenue that his liability for all Federal taxes imposed by the act of Congress approved October 3, 1913, and also by the act of Congress approved September 8, 1916, as amended by the act of Congress approved October 3, 1917, on his net income received from all sources in the year ended December 31, 1914, and in the year ended December 31, 1917, respectively, shall not be determined except after deliberate, intensive, and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that the above-named individual does not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against him for the said years by the officials of the Income Tax Unit.

"(S.) C. H. Stange.

"(Stamp:) Approved March 16, 1923.

(S.) D. H. Blair, Commissioner of Internal Revenue."

"Merrill, Wisconsin, November 10, 1922."

[fol. 25] XII

The distributions of stock and debenture notes as described above were never returned as taxable income by plaintiff. The Commissioner of Internal Revenue determined the value of all assets transferred, as above stated, by the A. H. Stange Company to the Union Land Company on June 10, 1914, to be $4,189,968.81. The Commissioner of Internal Revenue also determined the value of the assets transferred by the A. H. Stange Company on the same date to the Kinzel Lumber Company to be $305,000, thus making an aggregate value of all assets so transferred to both new corporations, of $4,494,968.81. The Commissioner of Internal Revenue then divided this aggregate sum by seven and determined that the quotient ($642,138.40) was additional taxable income received by plaintiff in 1914 and in

February, 1924, assessed additional income tax thereon against the plaintiff for 1914 in the sum of $28,992.55, which together with interest in the amount of $1,787.21 the plaintiff paid on March 19, 1925.

XIII

On or about March 30, 1926, plaintiff presented to the commissioner a claim for the refunding of $30,779.76 assessed and collected as stated in the preceding finding on the ground that no taxable dividend to the plaintiff resulted from the transactions set forth in Findings II to X inclusive. On June 8, 1927, the plaintiff presented to the commissioner a supplemental claim for refund covering the same payment of taxes and based on the ground that the bar of the statute of limitations had run against the collection of said taxes long prior to the time when the payment thereof was demanded and made by plaintiff. The claim for refund first made was formally rejected May 26, 1926. No action was taken on the supplemental claim for refund presented June 8, 1927.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and his petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Opinion

Green, Judge, delivered the opinion of the court:

This case involves taxes for the calendar year of 1914 assessed under the revenue act of 1913, and for which an income-tax return was filed by the plaintiff on February 19, 1915. The other facts material to the decision may be summarized as follows:

A. H. Stange, father of plaintiff, prior to March 24, 1914, was the owner of 1,780 shares of the 2,500 shares of the

stock in the A. H. Stange Company, a corporation, the re-
[fol. 26] mainder of this stock being held by his sons and daughters, or daughters and sons-in-law. On March 24, 1914, A. H. Stange organized a corporation known as the Union Land Company and on May 29, 1914, another corporation known as the Kinzel Lumber Company. On the last-named date the 2,500 shares of the capital stock of the A. H. Stange Company were reapportioned between Mr. Stange and his children in such manner as to give Mr. Stange and each of his sons and daughters (or daughters and sons-in-law) one-seventh of the said 2,500 shares. Prior to the reapportionment the plaintiff owned 120 shares in said company and after it was made, 357.

On June 10, 1914, pursuant to a resolution adopted by the board of directors, the A. H. Stange Company transferred to the Union Land Company cash in the amount of $60,000 and other property having a book value of $1,059,667.15, or a total of $1,119,667.15, and also in the same manner to the Kinzel Lumber Company cash and bills receivable in the total amount of $300,000 and a parcel of real estate valued on the books at $5,000. When these assets were transferred to the two companies the surplus account of the Stange Company was debited with the value of said assets. The Union Land Company entered on its books the assets so transferred to it at a total valuation of $3,491,-382.61, and the Kinzel Lumber Company in the same manner entered on its books the assets which it received in the total sum of $305,000.

The assets conveyed to the two companies were credited to the individual stockholders thereof in proportion to their respective interest in the A. H. Stange Company as shown by their stockholdings. In this manner the plaintiff was credited with $45,000 on the books of the Kinzel Lumber Company on June 2, 1914, and $497,000 on the books of the Union Land Company on June 13, 1914. At the last-named date the plaintiff withdrew from the Union Land Company $5,000 in cash which was charged to his account and the company issued to him capital stock of a par value of $35,000 which was also charged to his account. On June 16, he withdrew the further cash sum of $2,000 and on July 23, 1914, the company issued to him debenture notes in the sum of $455,000, both of which items were debited to his account. The total of all these debits balanced and

extinguished the original credit of $497,000 in the plaintiff's account. In the same manner plaintiff's credit account with the Kinzel Lumber Company was balanced by issuing to him stock of the par value of $15,000, cash $10,000, and debenture notes $20,000.

On November 14, 1922, the plaintiff executed and filed with the Bureau of Internal Revenue a written waiver of statutory limitations approved and accepted by the commissioner as set forth in Finding XI. The Commissioner of Internal Revenue determined that the total value of all assets transferred by the Stange Company to the Union Land Company and the Kinzel Lumber Company to be $4,494,968.81 and allocated one-seventh of this value ($642,-138.40) as taxable income to the plaintiff for the year 1914, and thereon in February, 1924, made an additional assessment of income taxes for 1914, which together with interest amounted to $30,779.76, which the plaintiff paid under protest on March 19, 1925. Thereafter on March 30, 1926, and on June 8, 1927, the plaintiff submitted to the Commissioner [fol. 27] of Internal Revenue a claim for refund and a supplement thereto. These claims for refund give rise to the following objections which the plaintiff makes to the validity of the tax assessed:

(1st) That the transaction involved constituted the distribution of the assets of the A. H. Stange Company and was not a taxable dividend.

(2d) That the waiver of the statute of limitations was confined merely to the assessment of the tax and did not waive the bar of the statute as to the collection thereof, and was executed after the expiration of the period of limitations.

(3d) That in any event plaintiff's taxable income as a result of the transactions involved could have been no greater than the amount credited to him on he books of the transferee companies, being a total of $542,000 instead of the amount of $642,138.40.

(4th) That the several acts of A. H. Stange and the corporations controlled by him herein involved were merely steps taken at the direction of the said A. H. Stange to effectuate a gift to his son, the plaintiff herein, and for that purpose constituted one transaction, and that the property

received by plaintiff was a nontaxable gift from father to son to the extent of 237/357 thereof.

We will first consider the claim of the plaintiff that the stock, cash, and debentures received by him, as above set forth, constituted a distribution in partial liquidation of the assets of the A. H. Stange Company.

It seems to be conceded in argument by both parties that the various acts by which certain property of the A. H. Stange Company was transformed into cash, debenture notes, and stock in the Union Land Company and the Kinzel Lumber Company constituted in reality one transaction and the findings of fact so state. Plaintiff contends that this was a distribution in partial liquidation of the assets of the Stange Company. The 1928 revenue act defines "amounts distributed in partial liquidation" as,

"A distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock."

A regulation to this effect had been in force for sometime prior to the passage of the last-named act and the part of the act which we have quoted, as we think, was merely the adoption in the statute of a principle of accounting already well settled. At all events we think the instant case is controlled in this respect by the case of Rockefeller v. United States, 257 U. S. 176, an exactly parallel case with the one at bar. In the Rockefeller case a corporation engaged in producing, buying, and selling crude petroleum and transporting it through its pipe lines formed a new corporation to which the pipe-line property was conveyed. In consideration for this conveyance and as a part of the transaction, the new corporation issued all of its capital stock to the stockholders of the old corporation pro rata. The old company remained in business and retained sufficient assets to cover its capital obligations, and the transfer of assets to the new corporation did not result in a reduction of its outstanding stock. The slight difference in the nature of [fol. 28] the facts between that case and the one at bar is immaterial to the legal questions involved. It appeared in the Rockefeller case, supra, that the stock of the new corporation was a consideration for the conveyance. In the

instant case the record is silent on the subject of consideration except as maybe inferred from the facts. The whole transaction was a family matter carried out in pursuance of a plan of A. H. Stange, the father, as a result of which certain property of the A. H. Stange Company passed to the two other corporations and the plaintiff received in lieu of the interest which he possessed therein as a stock holder of the A. H. Stange Company, cash, debenture notes, and stock of the new corporations. That it was a distribution of a part of the surplus of the A. H. Stange Company is quite clear. In fact this is conceded in argument by the plaintiff, but plaintiff says that the distribution was not in the way of a dividend but in partial liquidation. The fact is that there was no cancellation or redemption of any part of the stock of the A. H. Stange Company. We think this was necessary to sustain the claim that there was partial liquidation and in this we are sustained by the decision in the Rockefeller case wherein a practically similar transaction was held to be a dividend. In that case the court said:

"We deem it to be too plain for dispute that * * * the new pipe line company shares were in substance and effect distributed by the oil company to its stockholders; * * * in effect a dividend out of the accumulated surplus."

In the case at bar, after transfers were made by the A. H. Stange Company it still had a surplus of $362,560.78.

In Lynch v. Hornby, 247 U. S. 339, it was held that the 1913 revenue act imposed a tax upon—

"* * * all dividends declared and paid in the ordinary course of business by a corporation to its stockholders after the taking effect of the act (March 1, 1913), whether from current earnings, or from the accumulated surplus made up of past earnings or increase in value of corporate assets, notwithstanding it accrued to the corporation in whole or in part prior to March 1, 1913,"

and a distinction is drawn between this case and the case of Lynch v. Turrish, 247 U. S. 221, relied upon by plaintiff's counsel. It follows that if we are correct in holding the distribution to be in effect a dividend, it was taxable under the 1913 act notwithstanding the distribution was of the

accumulated surplus made up of past earnings or increase in the value of corporate assets.

We have hereinabove referred to the acts which resulted in the distribution of certain of the surplus of the A. H. Stange Company among the children of A. H. Stange, as one transaction. The plaintiff insists that beginning with the redistribution of the stock of the A. H. Stange Company whereby the children and children-in-law of A. H. Stange received more stock than they had heretofore held, there was only one transaction. We do not consider this material. What we are here concerned with is the distribution of the surplus of the A. H. Stange Company to its stockholders. The gift from A. H. Stange to his children was not taxable. The distribution of the surplus of the A. H. Stange Company to its stockholders was taxable whether it was only part of some inclusive transaction or not. There seems to have been some confusion of thought on this point. What we are holding was subject to a tax is [fol. 29] not a gift but the distribution of property by a corporation. A. H. Stange was merely a stockholder in the A. H. Stange Company. He could not give away any of the property of this company or distribute it in any manner. That had to be done by an act of the corporation itself, and the fact that A. H. Stange practically controlled the corporation's acts does not alter the legal effect.

It is also contended by plaintiff that the only amount that is taxable is the credit which was given the plaintiff on the books of the new companies, but what the plaintiff got in the distribution was stock, cash, and debenture notes. So far as the value of the property of the A. H. Stange Company which was distributed is concerned, there is no question but that the commissioner put a moderate valuation thereon. All of this property so distributed went to the new companies and plaintiff and the other heirs held the same proportionate interest therein through stock that they held in the A. H. Stange Company. It is quite evident that it was intended by the several transactions to so distribute the property that each of the heirs would receive his proportionate value of the property received by the new companies. Whether we place the calculation of the dividend upon the value of the property conveyed to the new companies or whether we place it upon the value of

the stock, cash, and debenture notes received, the result is the same for there is no proof that the combined value of what was received by the plaintiff in the end was not equal to the value of his interest in the property conveyed. Indeed the nature of the transaction indicates that it was.

The plaintiff's argument that the collection of the tax was barred by the statute of limitations is based on the claim that the waiver signed by plaintiff and the Commissioner of Internal Revenue was invalid because made after the expiration of the statutory period; and because by the terms thereof it was confined to the assessment of the tax, whereas the statute required the commissioner and taxpayer to "consent in writing to a later determination, assessment, and collection of the tax." The latter objection will be first considered.

The ordinary meaning of the word "assess," when used in connection with matters of taxation, is to fix the amount to be paid by the taxpayer. An assessment can only be made if the taxpayer is liable for the tax, and if liable for the payment of the tax it follows that it was collectible. In other words, a prerequisite of the right to assess is the right to collect the tax when assessed. It would seem, therefore, that an agreement for an assessment was based upon the understanding that the tax was collectible if assessed. However this may be, we think that a waiver of the statute of limitations is a contract, and that even if the statute has run, the moral obligation to pay a tax properly imposed is sufficient to constitute a consideration. The waiver in the case at bar, which is set out in Finding XI, set out a special consideration under which the commissioner agreed to exercise "deliberate, intensive, and thorough consideration" of the liability of plaintiff for the taxes which were to be assessed. Possibly this was the commissioner's duty in any event, and it might also be said that the statutes give him no authority to make a special agreement of this kind; but there was, as we have already seen, a consideration for the waiver and an understanding, as there always is when waivers are executed, that further time will be taken for the consideration of the taxpayer's claims. In construing the waiver, the rules with reference to the con- [fol. 30] struction of contracts should be applied. If the

waiver did not authorize the collection of the tax, its execution was an idle performance—it was nothing but a useless scrap of paper. Whether plaintiff so intended or not, he and his attorneys must have known that the commissioner accepted the waiver believing that it authorized the collection of any tax properly assessed. In such case, the rule with reference to contracts is—

"The language of a contract in case of ambiguity should be interpreted in the sense that the promisor knew or had reason to know that the promisee understood it." (13 C. J. sec. 484 c., page 523, and cases cited, page 526.)

It should be said also that the words "assess" and "assessment," when used with reference to taxes, often include the collection thereof as a necessary sequence. In fact the term "assess" is used at times to include all the steps involved in imposing a tax on property (Allen v. McKay, 120 Cal. 332), and "to assess" often means to levy a tax (see cases cited under note 76, C. J. 813), the two words being used with practically the same meaning, Idem, 76 (b), and the words "to levy" always include the collection of a tax. The same rule applies to the word "assessment," and the parties evidently intended that the word "assessment" should also cover the collection of the tax.

For the reasons stated above we think that the waiver removed the bar of the statute of limitations not only as to assessment but as to collection of the tax.

It is further insisted that the statute providing for waivers had no application to waivers executed after the running of the statute of limitations, and the case of Joy Floral Co. v. Commissioner, 29 Fed. (2d) 865, overruling 7 B. T. A. 800, is cited as so holding. In the case at bar the tax was assessed under section 250 (d) of the revenue act of 1921, which provided that as to taxes due for any prior year, they "shall be determined and assessed within five years after the return was filed, unless both the commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax." The Joy Floral Co. case, supra, discusses similar provisions contained in section 278 of the revenue act of 1924, under which the assessment was made in that case, and section 276 of

the revenue act of 1928. In the two last-named sections the words "have consented" are used instead of the word "consent" in section 250 (d) of the act of 1921. We do not think the difference is material for reasons hereinafter given, but the Joy Floral Co. case holds that the commissioner had no authority to enter into an agreement with the taxpayer for a waiver of the statute of limitations after the expiration of its limitation. The argument made in support of this decision is that the commissioner's signature, after the statute of limitations had run, was unimportant. This statement loses its force when it is considered that it is just as important at that period as it would have been before the limitation had run. In the absence of a statutory provision either before or after the running of the statute of limitations, the taxpayer could by a mere oral statement waive the running of the statute. Even after the running of the statute, the moral obligation to pay any taxes that were properly levied would be a sufficient consideration for the waiver. The reason for having the commissioner sign the waiver had, in our opinion, nothing to do with its validity. The [fol. 31] purpose of the statutory provision was to do away with the uncertainties of oral agreements. An oral statement on the part of the taxpayer would be subject to dispute and controversy as to its form and meaning, but Congress made it clear and definite that the taxpayer should not be bound unless written evidence of such waiver could be produced. On the part of the Government, it was always understood, if not by implication agreed, that the execution of these waivers would stay proceedings for the collection of the tax until the Government could properly consider the claims of the taxpayer. Congress did not intend that the Government should be bound in any way by the acceptance of waivers made by numerous collectors and revenue agents scattered all over the country but only in case the agreement was signed by the Commissioner of Internal Revenue. It was necessary for the orderly conduct of the Government's business that the commissioner should have full knowledge of the action taken. In this we find abundant reason for the requirement of the signature of the officer and, as we think, the only reason why it was required. To hold that the statute requires the commis-

sioner to consent to the waiver before the expiration of the period of limitation is to engraft upon the statute something which certainly is not contained within its provisions nor, as we think, is there any reason to infer that such was the intent of Congress.

In the same case of the Joy Floral Co., supra, much stress was laid upon the fact that in the revenue acts of 1924 and 1928 the statute provided in effect that the waiver would only be effectual where both the commissioner and the taxpayer "have consented" thereto in writing, and it is said the provisions just mentioned should be considered as interpretive of the language used in the 1921 act. It appears to have been thought that the use of the word "have" before the word "consented" implied that this action must have been taken before the expiration of the period of limitation. If Congress had intended that the waiver must be executed before the period of limitations had expired, we think it would have said so. But it did not and we see no justification for this construction which we think is neither grammatical nor logical. Whether the word "consent" is used alone, as it was in the 1921 Act, or words "have consented" are used as in the 1924 and 1928 acts, is immaterial. If a prior "consent" is required, then the parties must "have consented." The latter expressions are merely a paraphrase. In any event the parties must "have consented" to the waiver prior to the time of the collection of the tax and the words in the later statutes merely express the natural sequence of the two events. This is true even though the 1921 act be construed literally and strictly. In our opinion the decision of the Board of Tax Appeals is supported by the better reasoning, and the objections of the plaintiff to the validity of the waiver must be overruled.

From what we have stated above, it follows that the plaintiff's petition must be dismissed and it is so ordered.

Booth, Chief Justice, concurs.

Graham, Judge, concurs in the findings and the result.

[fol. 32]

VI. Judgment

At a Court of Claims held in the City of Washington on the 4th day of November, A. D., 1929, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this court, the amount thereof to be ascertained by the clerk and collected by him according to law. No printing having been done by the court, no costs are taxed.

[fol. 33] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,685. Court of Claims. Term No. 554. Charles H. Stange, petitioner, vs. the United States. Petition for writ of certiorari and exhibit thereto. Filed January 3, 1930. File No. 34,685.

FILE COPY

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Supreme Court of the United States

October Term, 1929

No. 23

CHARLES H. STANGE, Petitioner,

v.

THE UNITED STATES, Respondent.

BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI

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(273 U. S. 346), and the Benjamin Russell case (278 U. S. 181), and numerous decisions of the Board of Tax Appeals, such as those rendered in the cases of American Powder Mills, 12 B. T. A. 305 and Chicago Insulated Wire and Manufacturing Company, 10 B. T. A. 1195 10

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The present case involves questions of general public interest. Thousands of waivers have been given by taxpayers. These waivers differ in the language they contain. Many of them relate to assessment, only. Some were given before and others after the expiration of the statutory periods. A conflict of authority regarding the validity and effect of these waivers has been created by the decision of the Court of Claims in Petitioner's case. The Court of Claims is a Court of first instance and its judgments are reviewable only by this Court.

Uncertainty now exists in the minds of taxpayers and officials regarding the rules to be applied in determining the validity or invalidity of waivers. That such uncertainty extends to the Congress of the United States is inferable from the enactment of Section 506 of the Revenue Act of 1928. In fact, that section undoubtedly contemplates that an authoritative ruling shall be made by the Courts on the question of the validity of waivers given after the expiration of the statutory period of limitation. We respectfully suggest that, as conflict in the decisions of the Courts immediately subordinate to this Court, on this question, now exists, only by a decision of this Court of the question may an authoritative ruling be secured..... 20

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Supreme Court of the United States

October Term, 1929

No. 554

CHARLES H. STANGE, Petitioner,

v.

THE UNITED STATES, Respondent.

BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

We take the liberty of making the following suggestions in support of the petition for a writ of certiorari, in the present case.

Opinion of the Court Below

The opinion of the Court below was rendered by the Court of Claims on November 4, 1929, in the action of this petitioner against the United States, No. F-261 of the records of that Court. Such opinion has not yet been printed in the official reports, but is a part of the record on this appeal. (Record, pp. 26-35.)

Jurisdiction

(a) The jurisdiction of this Court under Section 288 of the Judicial Code is invoked. (28 U. S. C. A. 129.) Subdivision (b) of that section is as follows:

> "In any case in the Court of Claims, including those begun under Section 287, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause, including the findings of fact and the judgment or decree, but omitting the evidence, be certified to it for review and determination with the same power and authority, and with like effect, as if the cause had been brought there by appeal."

(b) The date of the decree of the Court of Claims, sought to be reviewed, is November 4, 1929. (Record, p. 35.) The petition for certiorari was filed on January 3, 1930.

(c) This is an action filed in the Court of Claims by petitioner against the United States, for the recovery of income taxes erroneously and illegally collected from him for the calendar year 1914. (Record, p. 7.)

(d) In the case of *Sun Shipbuilding Company* v. *United States*, 271 U. S. 96, the jurisdiction of this Court to review decisions of the Court of Claims, in certiorari proceedings, upon a showing of merit, was recognized.

Statement of Case

We adopt as a statement of the present case the Summary of Matters involved and the statement of the Reasons Relied on for the Allowance of the Writ of Certiorari, appearing in the Petition for Writ of Certiorari. (Record, pp. 1-6.)

Specifications of Errors

The Court below erred in finding and holding against petitioner on each of his contentions advanced in that Court, viz.:

1. The present case falls within the principle of the decision of this Court in *Lynch* v. *Turrish*, 247 U. S. 221, rather than that of *Lynch* v. *Hornby*, 247 U. S. 339. There is, therefore, no taxable element in the present case.

If, however, it be held that the transaction, consisting of the several steps taken by or at the direction of Mr. A. H. Stange, is a taxable one, it was urged that the amount of income taxable to all stockholders of the Stange Company may not exceed the amount of the accumulated realized profits of that company. As stated in the VI Finding of Facts, this amount was $982,227.93, exclusive of unrealized appreciation. The maximum amount taxable to petitioner, upon the application of this principle, would be one-seventh of this amount or $140,318.27.

2. The power *to assess* the alleged deficiency for 1914 expired long prior to February, 1924, when the additional assessment was made. This power could not be and was not revived by the waiver signed by plaintiff and the Commissioner of Internal Revenue in November, 1922, after the bar of the statute had fallen.

No collection waiver was ever given by petitioner. The power *to collect* the alleged deficiency expired long prior to March 19, 1925, the date on which collection was enforced. No liability existed at that time.

3. The several steps taken by Mr. A. H. Stange and the corporations controlled by him (A. H. Stange Company, Union Land Company, and Kinzel Lumber Company) constitute one transaction, which is a *non-taxable gift* from father to son. When so considered, the credits raised by the two new companies on their books in favor of petitioner are non-taxable to the extent of 237/357ths thereof. Nevertheless, the Commissioner held that the amount of the credits was a taxable dividend to the extent of 100 percent thereof.

4. The Commissioner of Internal Revenue *overstated the amount taxable* to petitioner, even though the transaction be regarded as taxable in its entirety.

ARGUMENT

Summary of Argument

As grounds for the issuance of the writ of certiorari in the present case, petitioner submits the following summary:

(a) The decision of the Court of Claims now sought to be reviewed on the validity of the assessment waiver given after the bar of the statute of limitations had become effective, is

in direct conflict with the decision of the D. C. Court of Appeals in the Joy Floral Company case, 29 Fed. (2d) 865. In fact, this conflict is expressly recognized in the last paragraph but one of the decision of the Court of Claims in the present case. These two Courts are immediately subordinate to this Court. The Court of Appeals of the District of Columbia has, in certain cases, concurrent jurisdiction with the several Circuit Courts of Appeal, of appeals in tax cases from decisions of the Board of Tax Appeals. (Section 1002 of the Revenue Act of 1926.)

(b) The decision of the Court below that the assessment waiver served to confer upon the Commissioner of Internal Revenue not only the power *to assess* but also the power to collect is in conflict with the underlying principle of decisions of this Court in the New York & Albany Lighterage Company case (273 U. S. 346), and the Benjamin Russell case (278 U. S. 181), and numerous decisions of the Board of Tax Appeals, such as those rendered in the cases of American Powder Mills, 12 B. T. A. 305 and Chicago Insulated Wire and Manufacturing Company, 10 B. T. A. 1195.

(c) The ruling of the lower Court that as a result of the steps outlined in the findings of fact petitioner received a taxable dividend in the amount of $642,138.40, is in conflict with the decisions of this Court in *Mobile and Ohio Railroad Company* v. *Tennessee*, 153 U. S. 486 and *Lynch* v. *Turrish*, 247 U. S. 221, and with the implication of the decisions of this Court in the Lynch-Hornby case, 247 U. S. 339, the Phellis case, 257 U. S. 156, and the Rockefeller case, 257 U. S. 176. Each of these cases, except the Mobile and Ohio case, arose under the Revenue Act of 1913.

(d) The present case involves questions of general public interest. Thousands of waivers have been given by taxpayers. These waivers differ in the language they contain. Many of them relate to assessment, only. Some were given before and others after the expiration of the statutory periods. A conflict of authority regarding the validity and effect of these waivers has been created by the decision of the Court of Claims in petitioner's case. The Court of Claims is a Court of first instance and its judgments are reviewable only by this Court.

Uncertainty now exists in the minds of taxpayers and officials regarding the rules to be applied in determining the validity or invalidity of waivers. That such uncertainty extends to the Congress of the United States is inferable from the enactment of Section 506 of the Revenue Act of 1928. In fact, that section undoubtedly contemplates that an authoritative ruling shall be made by the Courts on the question of the validity of waivers given after the expiration of the statutory period of limitation. We respectfully suggest that, as conflict in the decisions of the Courts immediately subordinate to this Court, on this question, now exists, only by a decision of this Court of the question may an authoritative ruling be secured.

These will be discussed in the order stated.

THE DECISION OF THE COURT OF CLAIMS NOW SOUGHT TO BE REVIEWED ON THE VALIDITY OF THE ASSESSMENT WAIVER GIVEN AFTER THE BAR OF THE STATUTE OF LIMITATIONS HAD BECOME EFFECTIVE, IS IN DIRECT CONFLICT WITH THE DECISION OF THE D. C. COURT OF APPEALS IN THE JOY FLORAL COMPANY CASE, 29 FED. (2d) 865. IN FACT, THIS CONFLICT IS EXPRESSLY RECOGNIZED IN THE LAST PARAGRAPH BUT ONE OF THE DECISION OF THE COURT OF CLAIMS IN THE PRESENT CASE. THESE TWO COURTS ARE IMMEDIATELY SUBORDINATE TO THIS COURT. THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA HAS, IN CERTAIN CASES, CONCURRENT JURISDICTION WITH THE SEVERAL CIRCUIT COURTS OF APPEAL, OF APPEALS IN TAX CASES FROM DECISIONS OF THE BOARD OF TAX APPEALS. (SECTION 1002 OF THE REVENUE ACT OF 1926.)

The decision of the D. C. Court of Appeals in the Joy Floral Company case, 29 Fed. (2d) 865, was rendered on the appeal of that company from a decision of the Board of Tax Appeals. The decision of the lower tribunal was to the effect that the waiver was valid even though given after the bar of the statute had fallen. That decision was reversed by the Appellate Court.

Declining to follow the decision of the District Court of Appeals, the Court of Claims in the present case, referring

to the Joy Floral case, said: "In our opinion the decision of the Board of Tax Appeals is supported by the better reasoning * * *."

No clearer conflict of decision by Courts subordinate to this Court could be found.

It is worth noting, also, that the decision of the D. C. Court of Appeals in the Joy Floral Company case was cited and followed by the U. S. District Court for Western District of Pennsylvania in the case of *Spear & Company* v. *Heiner*, 34 Fed. (2d) 795, decided June 5, 1929.

THE DECISION OF THE COURT BELOW THAT THE ASSESSMENT WAIVER SERVED TO CONFER UPON THE COMMISSIONER OF INTERNAL REVENUE NOT ONLY THE POWER *TO ASSESS* BUT ALSO THE POWER TO COLLECT IS IN CONFLICT WITH THE UNDERLYING PRINCIPLE OF DECISIONS OF THIS COURT IN THE NEW YORK & ALBANY LIGHTERAGE COMPANY CASE (273 U. S. 346), AND THE BENJAMIN RUSSELL CASE (278 U. S. 181), AND NUMEROUS DECISIONS OF THE BOARD OF TAX APPEALS, SUCH AS THOSE RENDERED IN THE CASES OF AMERICAN POWDER MILLS, 12 B. T. A. 305, AND CHICAGO INSULATED WIRE AND MANUFACTURING COMPANY, 10 B. T. A. 1195.

In the decisions of the Board of Tax Appeals, cited above, the tax was assessed under a waiver of the exact form relied upon by the Commissioner of Internal Revenue in the present case. There, as here, no *collection* waiver was given. The Board held in each case that collection was barred by the statute. In the Chicago Insulated Wire and Manufacturing Company case, the Board of Tax Appeals held:

> "The written consent entered into between petitioner and the Commissioner expired April 1, 1924. The Commissioner made the assessment on March 25, 1924, which was within the period agreed upon. The amount assessed and now claimed by the Commissioner has never been collected. Since the five-year period within which the Commissioner might collect any amount from the taxpayer as a tax expired under the statute and the consent before the passage of the Revenue Act of 1924, collection of the proposed deficiency is now barred by the statute of

limitations. *Ocean Accident & Guarantee Corporation, Ltd.*, 6 B. T. A. 1045; *Theodore H. Wickwire, Jr., et al., Executors*, 10 B. T. A. 102; *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346."

The material facts of petitioner's case are identical with those of the cited case. In the latter case, the Board of Tax Appeals held that the right of *collection* was barred by the statute, even though the tax was assessed within the time specified in the waiver. A contrary ruling was made in petitioner's case by the court below.

The decision of the Court of Claims in the present case holds that when, by the waiver, petitioner waived the statute of limitations upon the power *to assess*, he thereby, without more, waived the limitation upon the power to collect. The Revenue Acts, however, contain separate and independent provisions relating to the two powers. In all acts, there is a limitation period for assessment and a separate period for collection. In some of the acts the two periods run concurrently and in others consecutively; but in all acts the separate character of each period is recognized. Section 250(d) of the Revenue Act of 1918, Section 250(d) of the Revenue Act of 1921, Sections 277 and 278 of the Revenue Act of 1924, Sections 277 and 278 of the Revenue Act of 1926.

The applicable provisions of the Revenue Act of 1921 are contained in Section 250(d) of that Act, from which we quote (42 Stats. at L. 227-265):

> "The amount of income, excess-profits or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the tax-

payer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts or of any taxes due under Section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act."

If effect is to be given these provisions of the Acts, the two things—the power to assess and the power to collect—must not be confused with each other. This being true, we are led to the question of whether both powers are within the scope of the language of the waiver, the document relied upon by respondent.

The waiver provides that petitioner "hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered." Nothing could be clearer than that the "statutory provisions" to which the waiver refers are those only which relate to the period of assessment. No effort was made in the Court below to vary the terms of the waiver by a plea or evidence of fraud or mistake.

It will be conceded, we assume, that the assessment made under the waiver can have no greater efficacy than an assessment made under the statute within the statutory period. Assuming its validity for the moment, we premise that the incidents of the assessment made in the present case under the waiver in 1922 are no more and no less than the incidents of an assessment that might have been made before the end of the statutory period.

In the Lighterage case, 273 U. S. 346, the question for decision was stated in the opinion to be:

> "Where under the tax laws enacted prior to the Revenue Act of 1921, income and excess profits taxes were assessed within five years after filing return, does Section 250(d) of that Act bar collection by distraint proceedings begun after the expiration of the five-year period?"

This question was answered by the Court in the affirmative. One of the principles necessarily established by the decision was that power to collect was not one of the incidents of an assessment seasonably made. If, then, the incidents of an assessment made under a waiver are the same as those of an assessment made under the statute, the conclusion is inevitable that, under the principle of the Lighterage decision, the power *to collect* is not one of the incidents of the power to assess conferred by waiver.

The same principle runs through the decision of this Court in the Benjamin Russell case, 278 U. S. 181.

That there is conflict between the opinions of this Court in the Lighterage and Russell cases and the opinion below, is apparent from a consideration of the following excerpt from the latter opinion:

> "It should be said also that the words 'assess' and 'assessment,' when used with reference to taxes, often include the collection thereof as a necessary sequence. In fact the term 'assess' is used at times to include all the steps involved in imposing a tax on property (*Allen* v. *McKay*, 120 Cal. 332), and 'to assess' often means to levy a tax (see cases cited under note 76, 5 C. J. 813), the two words being used with practically the same meaning, Idem. 76(b), and the words 'to levy' always include the collection of a tax."

In the opinions of this Court in the Lighterage and Russell cases, the exercise seasonably of the power to assess was not regarded as conferring the power to collect, "as a necessary sequence."

The rule on this subject in each jurisdiction must be determined in the light of its own statute law; and decisions of California or other State Courts based upon local statutes do not assist us in construing the Federal income tax acts where there is no merger of the two powers.

THE RULING OF THE LOWER COURT THAT AS A RESULT OF THE STEPS OUTLINED IN THE FINDINGS OF FACT PETITIONER RECEIVED A TAXABLE DIVIDEND IN THE AMOUNT OF $642,138.40, IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN

MOBILE AND OHIO RAILROAD COMPANY V. TENNESSEE, 153 U. S. 486 AND LYNCH V. TURRISH, 247 U. S. 221, AND WITH THE IMPLICATION OF THE DECISIONS OF THIS COURT IN THE LYNCH-HORNBY CASE, 247 U. S. 339, THE PHELLIS CASE, 257 U. S. 156, AND THE ROCKEFELLER CASE, 257 U. S. 176. EACH OF THESE CASES, EXCEPT THE MOBILE AND OHIO CASE, AROSE UNDER THE REVENUE ACT OF 1913.

The accumulated surplus or undivided profits of the Stange Company immediately before the transfer of assets to the two new companies, exclusive of unrealized appreciation of timbered lands, was $982,227.93. (VI Findings of Fact.) If we assume the entire amount thereof was distributed to its stockholders, petitioner's share thereof could not exceed $140,318.27. The other two companies had no surplus or undivided profits.

Respondent's theory accepted by the lower Court is that a *taxable dividend* was received by petitioner, i. e., that the distribution here involved constituted a *dividend*, within the meaning of that term in the Revenue Act in the amount of $642,138.40.

The Revenue Act here involved is that of 1913. It contains this provision (Section B):

> "That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever."

As said by the Supreme Court in the Phellis case, relative to the above quoted language:

> "Disregarding the slight looseness of construction, we interpret 'gains, profits, and income derived *from* * * *

dividends', etc., as meaning not that everything in the form of a dividend must be treated as income, but that income derived *in the way* of dividends shall be taxed. Hence the inquiry must be whether the shares of stock in the new company received by claimant as a dividend by reason of his ownership of stock in the old company constituted (to apply the tests laid down in *Eisner* v. *Macomber*, 252 U. S. 189, 207, 64 L. ed. 521, 528, 9 A. L. R. 1570, 40 Sup. Ct. Rep. 189) a gain derived from capital, not a gain accruing to capital, nor a growth or increment of value in the investment, but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital, however invested, and coming in, that is, received or drawn by the claimant for his separate use, benefit, and disposal."

(The above italics appear in the opinion.)

The technical as well as the ordinary meaning of the word "dividend" was clearly stated by this Court in *Mobile and Ohio Railroad Company* v. *Tennessee*, 153 U. S. 486, from which we quote:

> "The term 'dividend' in its technical as well as in its ordinary acceptation means that portion *of its profits* which the corporation, by its directory, sets apart for ratable division among its shareholders."

In each of the Revenue Acts beginning with the Revenue Act of 1916, some such definition of the term "dividend" as the following appears:

> "The term 'dividend' * * * means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913."

We see, therefore, that for 1916 and subsequent years two elements are required to make corporate distributions taxable dividends, viz:

1. It must be made out of earnings or profits; and
2. It must be made out of earnings or profits accumulated since March 1, 1913.

The second of these elements is required solely by reason of the provision of the statutory definition; and in the absence

of such a provision, this element does not enter into the definition. The first requirement above, however, is but a repetition in the statute of both the technical and ordinary meaning of the term. (Mobile and Ohio Railroad-Tennessee case supra.) It, therefore, is to be applied in the construction of the term as used in the Revenue Act of 1913, even though the statutory definition be omitted from that Act.

We conclude broadly that no corporate distribution is to be regarded as a taxable dividend unless it be made out of earnings or profits of the distributing corporation.

But should unrealized appreciation be regarded as "earnings or profits" within the meaning of the definition? The answer to this question will be taken from the opinions of this Court, upon a consideration of the four corners of the Revenue Acts.

Under none of the Revenue Acts enacted since the Income Tax Amendment became effective has unrealized appreciation been treated as "earnings or profits."

That unrealized appreciation should not be so regarded was the ruling of this Court in the La Belle Iron Works case, 256 U. S. 377. In that case it was held that unrealized appreciation was not included in the terms, "paid in or earned surplus and undivided profits," appearing in Section 207 of the Revenue Act of 1917.

The accepted construction of the several Revenue Acts was approved by this Court in the Phellis case, in differentiating a taxable from a non-taxable distribution. The Court said:

> "Hence the inquiry must be whether the shares of stock * * * constituted a gain derived from capital, not a gain accruing to capital, *nor a growth or increment of value in the investment*, but a gain, a profit. * * *"

In the Lynch-Turrish case, 247 U. S. 221, this Court, quoting with approval from the earlier case of *Gray* v. *Darlington*, 15 Wall. 63, laid down this rule:

> "The mere fact that property has advanced in value between the date of its acquisition and sale does not authorize the imposition of the tax on the amount of the advance. Mere advance in value in no sense constitutes

the gains, profits, or income specified by the statute. It constitutes and can be treated merely as increase of capital."

Let us consider for a moment whether this Court has ever classified as a taxable dividend any corporate distribution that was not made out of earnings or profits theretofore *realized* by the distributing corporation.

The Lynch-Turrish decision involved a complete liquidation of the distributing company, but much of the reasoning of the decision is equally applicable here. The Court ascertained, first, the basis of the decisions of the lower Courts in favor of the taxpayer and then approved the reasoning of the lower Courts. Quoting from the opinion of this Court:

> "The District Court and the Circuit Court of Appeals decided that the amount so distributed to Turrish was not income within the meaning of the statute, basing the decision on two propositions, as expressed in the opinion of the Circuit Court of Appeals, by Sanborn, Circuit Judge; (a) The amount was the realization of an investment made some years before, representing its gradual increase during those years, and which reached its height before the effective date of the law, that is, before March 1, 1913, and the mere change of form of the property 'as from real to personal property or from stock to cash,' was not income to its holders because the value of the property was the same after as before the change; (b) *the timber lands were the property, capital, and capital assets of their legal and equitable owner, and the enhancement of their value during a series of years 'prior to the effective date of an income tax law, although divided or distributed by dividend or otherwise subsequent to that date, does not become income, gains, or profits taxable under such an act.'* "

In the Lynch-Hornby case (247 U. S. 339) in which this Court held the distribution to be taxable, it appeared that of the total distribution ($650,000), "$240,000, or 24 percent of the par value of the capital stock, was derived from current earnings, and $410,000 from conversion into money of property that it owned or in which it had an interest on March 1,

1913." There was in the Lynch-Hornby case, also, a large element of appreciation accrued prior to March 1, 1913.

We recall here, first, that the Revenue Act of 1913 did not draw the line through March 1, 1913, to distinguish the taxable from the non-taxable. It was, therefore, not material, for purposes of the 1913 Act, that the distributed earnings accrued before that date. No claim is made in the present case that the distribution was non-taxable solely because it was made out of earnings or profits accrued prior to March 1, 1913.

We may lay to one side 24 percent of the distribution in the Lynch-Hornby case, i. e., the portion thereof which was made from current earnings. But, what of the remainder of the distribution?

It appears that it was made from a *conversion into money* of property owned on March 1, 1913. When appreciation is converted into money, it may no longer be regarded as *unrealized* but rather becomes *realized;* and it is *realized* appreciation that gives rise to "gains or profits" within the meaning of the Revenue Acts. No such realization appears in petitioner's case.

This Court had analogous questions before it in the Phellis (257 U. S. 156) and Rockefeller (257 U. S. 176) cases. In the latter case the corporation was engaged in producing and selling petroleum and in transporting it through its own pipe lines. The pipe line property was conveyed to a new corporation in consideration of its capital stock, which was then distributed to the shareholders of the old company, in proportion to their stockholdings. It was held that these steps gave rise to taxable income. The distribution was defined or classified by the Court as follows: "It was in substance and in effect, not merely in form, a *dividend of profits* by the corporation and individual income to the stockholder." No question of unrealized appreciation was involved in the Rockefeller case.

The decision in the Rockefeller case is based largely upon the decision in the Phellis case decided on the same day (November 21, 1921) by the Supreme Court. In fact, we regard the Phellis case as the leading case of the class to which it belongs. Some of the material facts of that case are stated in the syllabus as follows:

"With the concurrence of 90 percent of the stockholders of a corporation, a plan of reorganization was effected, pursuant to which a new corporation with an authorized capital stock nearly four times as great in par value as the aggregate stock and bonded indebtedness of the old was formed under the laws of a different State, all the assets of the old were transferred to the new, as a going concern, including the good will and a large surplus, and in consideration, the old corporation retained money enough to redeem part of its bonds and received (1) the new company's debenture stock of par value sufficient to redeem the remainder, retire its own preferred stock and leave in its treasury an amount equal in par value to its own outstanding common stock, and (2) the new company's common stock of par value double the amount of the old company's outstanding common stock, which the latter immediately distributed to its common stockholders as a dividend, paying them two shares of the new for each of the old. Upon completion of the transaction, October 1, 1915, the personnel of the stockholders and officers of the two corporations was identical, the stockholders having proportionate holdings in each; but less than one-half of the new company's authorized stock had been issued. Thereafter the old corporation continued as a going concern, but except for the redemption of its bonds and retirement of its preferred stock, and the holding of the debenture stock equal to its common, and collection and disposition of the dividends thereon, did no business."

No question of unrealized appreciation was involved.

The Court held the transaction to be taxable.

In the opinion the Court, referring to the original corporation, was careful to point out that:

"It had an excess of assets over liabilities showing a large surplus of *accumulated profits;* the precise amount is not important, *except that it should be stated that it was sufficient to cover the dividend distribution presently to be mentioned.*"

The fact that the distribution in the Phellis case came from accumulated profits is emphasized by the Court several times in the course of the opinion. We quote: "The common stock of the new company, after its transfer to the old company and prior to its distribution, constituted assets of the old company which it now held to represent its surplus of *accumulated profits* * * * the individual stockholders of the old company, including claimant, received assets of exchangeable and actual value severed from their capital interest in the old company, proceeding from it as the result of a division of former *corporate profits.*" "Where, as in this case, the dividend constitutes a distribution of *profits accumulated* during an extended period. * * *". "In short, the question whether a dividend *made out of company profits* constitutes income of the stockholder is not affected by antecedent transfers of the stock from hand to hand." Finally, the conclusion of the Court is stated as follows:

> "It thus appears that in substance and fact, as well as in appearance, the dividend received by claimant was a gain, a profit, derived from his capital interest in the old company, not in liquidation of the capital *but in distribution of accumulated profits of the company;* something of exchangeable value produced by and proceeding from his investment therein, severed from it and drawn by him for his separate use."

THE PRESENT CASE INVOLVES QUESTIONS OF GENERAL PUBLIC INTEREST. THOUSANDS OF WAIVERS HAVE BEEN GIVEN BY TAXPAYERS. THESE WAIVERS DIFFER IN THE LANGUAGE THEY CONTAIN. MANY OF THEM RELATE TO ASSESSMENT, ONLY. SOME WERE GIVEN BEFORE AND OTHERS AFTER THE EXPIRATION OF THE STATUTORY PERIODS. A CONFLICT OF AUTHORITY REGARDING THE VALIDITY AND EFFECT OF THESE WAIVERS HAS BEEN CREATED BY THE DECISION OF THE COURT OF CLAIMS IN PETITIONER'S CASE. THE COURT OF CLAIMS IS A COURT OF FIRST INSTANCE AND ITS JUDGMENTS ARE REVIEWABLE ONLY BY THIS COURT.

UNCERTAINTY NOW EXISTS IN THE MINDS OF TAXPAYERS AND OFFICIALS REGARDING THE RULES TO BE APPLIED IN DETERMINING THE VALIDITY OR INVALIDITY OF WAIVERS. THAT SUCH UNCERTAINTY EXTENDS TO THE CONGRESS OF THE UNITED STATES IS INFERABLE FROM THE ENACTMENT OF SECTION 506 OF THE REVENUE ACT OF 1928. IN FACT, THAT SECTION UNDOUBTEDLY CONTEMPLATES THAT AN AUTHORITATIVE RULING SHALL BE MADE BY THE COURTS ON THE QUESTION OF THE VALIDITY OF WAIVERS GIVEN AFTER THE EXPIRATION OF THE STATUTORY PERIOD OF LIMITATION. WE RESPECTFULLY SUGGEST THAT, AS CONFLICT IN THE DECISIONS OF THE COURTS IMMEDIATELY SUBORDINATE TO THIS COURT, ON THIS QUESTION, NOW EXISTS, ONLY BY A DECISION OF THIS COURT OF THE QUESTION MAY AN AUTHORITATIVE RULING BE SECURED.

Section 506 of the Revenue Act of 1928 (45 Stats. at L. 870) contains these provisions:

> "(a) Section 278(c) and (d) of the Revenue Act of 1926 are amended to real as follows:
>
> "'(c) Where before the expiration of the time prescribed in section 277 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.
>
> "'(d) Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year

period. The period so agreed upon may be extended b
subsequent agreements in writing made before the e
piration of the period previously agreed upon.'

"(b) Section 278 of the Revenue Act of 1926 is furth
amended by adding at the end thereof a new subdivisi
to read as follows:

"'(f) Any agreement which would be within the pr
visions of subdivision (c) or (d) of this section but f
the fact that it was executed after the expiration of t
period of limitation extended by such agreement, sha
be valid and effective according to its terms if entere
into after the enactment of the Revenue Act of 1928 a
before January 1, 1929.'

"(c) The amendments made by this section to the Re
enue Act of 1926 shall not be construed as in any mann
affecting the validity of waivers made prior to the enac
ment of this Act, which shall be determined according
the law in existence at the time such waiver was filed

It will be seen at once that by the above Subdivisions (
and (d) of Section 278 of the 1926 Act, as amended, Congre
differentiated between waivers given before and those giv
after the expiration of the statutory period. Only those th
were given before such expiration were recognized as valid
the section.

The rule on this subject is accentuated by Subdivision (f
whose provisions are expressly limited to waivers given aft
the enactment of the 1928 Act (May 29, 1928) and befo
January 1, 1929.

This brings us to the closing subdivision of Section 506.

The determination of the validity of waivers given aft
the expiration of the statutory period but before the enac
ment of the Revenue Act of 1928—such as the waiver in t
present case—is left by the section to the Courts. Congres
in effect, said: "We will pass that question to the Courts f
solution."

Conflicting rulings of courts immediately subordinate
this Court have been the result of this submission.

What could be more appropriate than that an authoritati
ruling on the question should be made by this Court? Su

a ruling, we suggest, would not only remove the conflict of authority but would also constitute a complete response to the Congressional submission.

For these reasons we respectfully request the issuance of the writ of certiorari, in the present case.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 554 23

CHARLES H. STANGE, PETITIONER,

v.

THE UNITED STATES, RESPONDENT.

BRIEF FOR PETITIONER.

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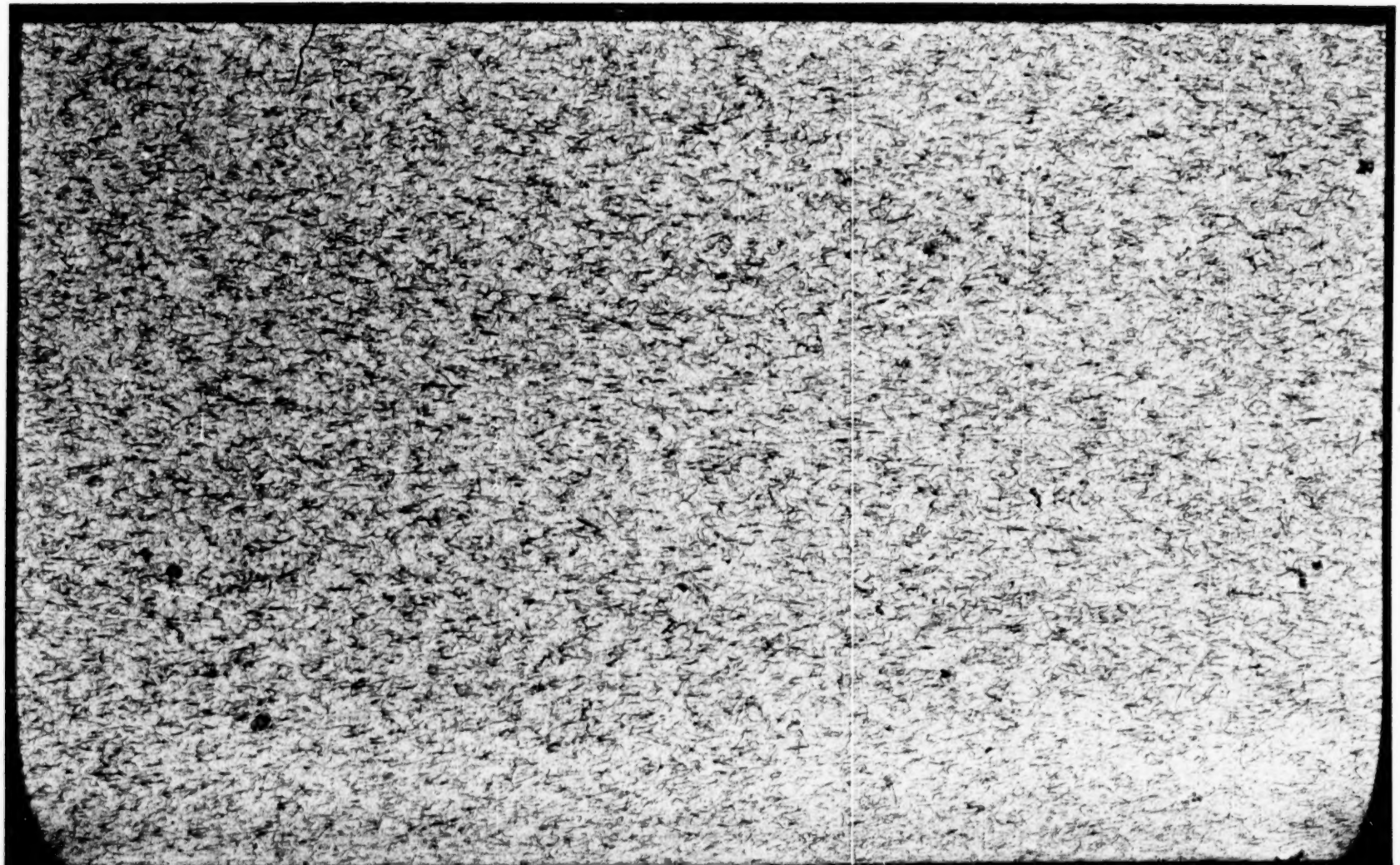

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The Court of Claims erred: In holding valid the waiver of November 14, 1922, given after the expiration of the statutory periods for assessing and collecting the additional taxes here involved. Section 250(*d*) of the Revenue Act of 1921 contemplates that waivers shall be obtained by the Commissioner of Internal Revenue before the expiration of the statutory periods..... 19

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 554

CHARLES H. STANGE, PETITIONER,

v.

THE UNITED STATES, RESPONDENT.

BRIEF FOR PETITIONER.

MAY IT PLEASE THE COURT:

This is an appeal granted by this Court from a decision of the Court of Claims holding that plaintiff below was not entitled to recover the amount of certain income taxes, for 1914, exacted of him by the collecting officers of the United States. The plaintiff below, Charles H. Stange, will be referred to herein as "petitioner". Unless otherwise indicated, the italics of this brief are ours. Copies of the sections of the Revenue Acts involved on this appeal appear in the appendix of this brief.

Opinion of the Court Below.

The opinion of the Court below was rendered by the Court of Claims on November 4, 1929, in the action of this petitioner against the United States, No. F-261 of the records of that Court. This opinion has not yet been printed in the bound volume of the Reports of the Court of Claims. It is a part of the record on this appeal. (Rec. p. 26-35.)

Jurisdiction.

This Court has heretofore granted a writ of certiorari under Section 288 of the Judicial Code (28 U. S. C. A. 129). Subdivision (*b*) of that section is as follows:

> "In any case in the Court of Claims, including those begun under Section 287, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause, including the findings of fact and the judgment or decree, but omitting the evidence, be certified to it for review and determination with the same power and authority, and with like effect, as if the cause had been brought there by appeal."

The date of the decree of the Court of Claims, sought to be reviewed, is November 4, 1929. (Rec., p. 35.) The petition for certiorari was filed on January 3, 1930. It was granted on March 3, 1930.

This is an action filed in the Court of Claims by petitioner against the United States, for the recovery

of income taxes erroneously and illegally collected from him for the calendar year 1914. (Rec., p. 7.)

Statement of the Case.

We submit as a statement of facts of the present case the findings of fact of the lower Court appearing at pages 17-26 of the record.

Specification of Errors.

The Court of Claims erred in its conclusions of law in the present case, as follows:

1. In holding that the waiver of November 14, 1922, extended the statutory period for making the additional assessment. It had no such effect because it was not a statutory waiver, *i. e.*, its provisions did not conform to Section 250(*d*) of the Revenue Act of 1921.

2. In holding that the waiver of the period of limitation for making an assessment conferred also the power to make collection at any time thereafter. In each of the Revenue Acts the two powers are separate and distinct. The waiver of the provisions of the Revenue Acts relating to the assessable period does not confer the power to collect after the expiration of the statutory period for collection.

3. In holding valid the waiver of November 14, 1922, given after the expiration of the statutory periods for assessing and collecting the additional taxes here involved. Section 250(*d*) of the Revenue Act of 1921 contemplates that waivers shall be obtained by the Com-

missioner of Internal Revenue before the expiration of the statutory periods.

These errors will be discussed in the order stated.

THE COURT OF CLAIMS ERRED:

IN HOLDING THAT THE WAIVER OF NOVEMBER 14, 1922, EXTENDED THE STATUTORY PERIOD FOR MAKING THE ADDITIONAL ASSESSMENT. IT HAD NO SUCH EFFECT BECAUSE IT WAS NOT A STATUTORY WAIVER, I. E., ITS PROVISIONS DID NOT CONFORM TO SECTION 250(*d*) OF THE REVENUE ACT OF 1921.

The income-tax return of petitioner for 1914 was filed on February 19, 1915. (Finding I, Rec., p. 17.) On November 14, 1922, petitioner signed and delivered to the Bureau of Internal Revenue a waiver reading as follows (Finding XI, Rec., p. 25):

> "C. H. Stange, of Merrill, Wisconsin, in consideration of the assurance given him by officials of the Income Tax Unit of the Bureau of Internal Revenue that his liability for all Federal taxes imposed by the Act of Congress approved October 3, 1913, and also by the Act of Congress approved September 8, 1916, as amended by the Act of Congress approved October 3, 1917, on his net income received from all sources in the year ended December 31, 1914, and in the year ended December 31, 1917, respectively, shall not be determined except after deliberate, intensive, and thorough consideration, hereby waives any and all statutory limita-

tions as to the time within which assessments based upon such liability may be entered. It is understood, however, that the above-named individual does not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against him for the said years by the officials of the Income Tax Unit.

(Signed) C. H. STANGE.

(Stamp:) Approved March 16, 1923.
(Signed) D. H. BLAIR,
Commissioner of Internal Revenue.

Merrill, Wisconsin, November 10, 1922."

It will be observed that the waiver relates solely to the time within which assessments may be entered. It does not undertake to waive the limitation period for making collection.

In February, 1924, the Commissioner of Internal Revenue assessed additional income taxes for 1914 against petitioner in the amount of $28,992.55 which, together with interest in the amount of $1,787.21, petitioner paid to the collecting officer on March 19, 1925. This is the payment involved in the present case. Thereafter, and within the statutory period, refund claim was filed and rejected. (Findings XII and XIII, Rec. p. 25-26.) It should be emphasized at this point that the assessment involved in the present case was made prior to the enactment of the Revenue Act of 1924 on June 2nd of that year.

Section 250(*d*) of the Revenue Act of 1921 provides that income taxes imposed by prior revenue acts "shall

be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax * * *".

The tax in the present case was not assessed within five years after the return was filed; and the obvious answer to reliance upon the excepting clause *supra* is that neither the Commissioner nor petitioner has ever consented to a later determination, assessment, and collection of the 1914 additional tax. We suggest that under no recognized rule of statutory construction may it be said that consent to the exercise by an administrative officer of one or even two statutory powers implies consent to the exercise of an additional statutory power or powers.

The plain language of the subdivision is that the power to determine and assess must be exercised within five years after the filing of the return, unless a written consent to a later *determination, assessment, and collection* be entered into by the Commissioner and the taxpayer. In the absence of such a consent, *i. e.*, a consent containing these provisions, the limitation provided by the preceding portion of the sentence is left fully operative. Congress has prescribed the exact method by which the statutory period might be extended; and our view is that that method must be followed if the extension is to be accomplished.

The sole question that can arise in this connection, so far as we can see, is whether the provisions of the excepting clause are mandatory or merely directory. The rule on this subject is stated in Hubbert *v.* Camp-

bellsville Lumber Company, 191 U. S. 70, from which we quote:

> "Much is said in the opinion of the court of appeals as well as in the briefs of counsel as to the difference between a directory and a mandatory provision,—the plaintiff claiming that Sec. 10 is simply directory, while the defendant insists that it is mandatory. In that opinion these authorities are cited:
>
> "'By directory provisions,' says Judge Cooley, 'is meant that they are to be considered as giving directions which ought to be followed, but not so limiting the power in respect to which the directions are given that it cannot be effectually exercised without observing them.' Cooley Const. Lim. 74.
>
> "Lord Penzance, in Howard *v.* Bodington, L. R. 2 P. Div. 211, after commenting on the difficulty of gathering any rule from the cases, said: 'I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the act, and upon a review of the case in that aspect decide whether the enactment is what is called "imperative" or "directory".'"

In the cited case it appeared that an amendatory act of a State Legislature relating to the issuance of certain bonds provided that the bonds should set forth a certain stipulation, "on their face". The bonds did not contain the stipulation specified in the Act, but did

contain a reference to the original Act authorizing their issuance. The question before this Court was whether the bondholder was entitled to the benefit of the provisions of the amendatory Act. Regarding mandatory and directory provisions, the Court said:

> "Without attempting to state any general rule, if indeed one such exists, for distinguishing between a directory and a mandatory provision, it is sufficient to say that when a statute provides an extraordinary remedy to the holder of bonds containing an express stipulation that he 'shall be entitled' to that remedy, *it should not be adjudged that he is also entitled to it in the absence of such stipulation*, for it is a reasonable presumption that if the county, in issuing the bonds, intended to contract for such extraordinary remedy, it would have complied *with the express provision of the statute, and incorporated the stipulation into the bonds.*"

So, in the present case it may be said that if the Commissioner of Internal Revenue intended to make the waiver a statutory consent under Section 250(*d*) of the Revenue Act of 1921, he would have complied with the express provisions of that section and incorporated into the waiver the provisions relating to collection.

The imposition of taxes involves an exercise of the sovereign power of the Government. The property of the citizen is taken for the support of the Government, whether he be willing or unwilling. It is seldom indeed that provisions defining or limiting the power of taxing officials will be regarded as being directory, only.

The importance of the subject matter negatives any such conclusion.

The reason for the use of the conjunctive "and" and the inclusion of the word "collection" in the clause of the subdivision, "determination, assessment, and collection", is obvious. Immediately after the above-quoted provision of Section 250(*d*) follows this clause:

> "and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act."

The periods of limitation for making the assessment and for enforcing collection of taxes imposed by the Revenue Act of 1913 were therefore the same, viz., five years after the filing of the return. Nothing would be accomplished in aid of the revenue by the making of an assessment which could not be collected by reason of the bar of the statute. Congress did not intend that the Commissioner of Internal Revenue should do an idle thing. It, therefore, provided that no assessment should be made after five years from the filing of the return unless the Commissioner had in his possession a consent not only to a later assessment but also to a later collection of the tax.

It is, therefore, we suggest, a sufficient objection to the applicability of the waiver that it is not a *statutory* consent, *i. e.*, not such a consent as is required by Section 250(*d*) of the Revenue Act of 1921 to waive the limitation upon the power of the Commissioner to make the assessment.

THE COURT OF CLAIMS ERRED:

IN HOLDING THAT THE WAIVER OF THE PERIOD OF LIMITATION FOR MAKING AN ASSESSMENT CONFERRED ALSO THE POWER TO MAKE COLLECTION AT ANY TIME THEREAFTER. IN EACH OF THE REVENUE ACTS THE TWO POWERS ARE SEPARATE AND DISTINCT. THE WAIVER OF THE PROVISIONS OF THE REVENUE ACTS RELATING TO THE ASSESSABLE PERIOD DOES NOT CONFER THE POWER TO COLLECT AFTER THE EXPIRATION OF THE STATUTORY PERIOD FOR COLLECTION.

As petitioner's 1914 return was filed on February 19, 1915, the power to collect any additional taxes from him for that year expired not later than February 20, 1920. No waiver of the statutory provisions fixing the time for making collection was ever given by petitioner.

It was held, however, by the lower Court that when petitioner waived the statute limiting the time for making an assessment he thereby, and without more, waived the provisions of the statute relating to the time for

making collection. We quote from the opinion below:

> "It should be said also that the words 'assess' and 'assessment', when used with reference to taxes, often include the collection thereof as a necessary sequence. In fact the term 'assess' is used at times to include all the steps involved in imposing a tax on property (Allen *v.* McKay, 120 Cal. 332), and 'to assess' often means to levy a tax (see cases cited under note 76, 5 *C. J.* 813), the two words being used with practically the same meaning, Idem, 76(*b*), and the words 'to levy' always include the collection of a tax. The same rule applies to the word 'assessment', and the parties evidently intended that the word 'assessment' should also cover the collection of the tax."

There is no evidence in this case that either party to the waiver of November 14, 1922, had any intention contrary or additional to the terms of the document itself; and in the absence of a showing of fraud or mistake, the intent is to be taken from the language of the writing. On this point we quote from *Corpus Juris*, Vol. 13, p. 524:

> "Restriction to Terms of Contract.—The intention of the parties is to be deduced from the language employed by them, and the terms of the contract, where unambiguous, are conclusive, in the absence of averment and proof of mistake, the question being, not what intention existed in the minds of the parties, but what intention is expressed by the language used. When a written contract is clear and unequivocal, its

> meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed. Where the contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention.
>
> "COURT CANNOT MAKE NEW CONTRACT.—It is not the province of the Court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, without regard to its wisdom or folly, as the Court cannot supply material stipulations or read into the contract words which it does not contain."

Cf. Green *v.* Biddle, 8 Wheat. 1; Calderon *v.* Atlas S. S. Co., 170 U. S. 272; Commissioner *v.* Gottlieb, 255 U. S. 310.

This rule, we suggest, applies *a fortiori* to the waiver in the present case, the form and language of which were prepared solely by the Commissioner of Internal Revenue.

Considering next the alleged merger of the two powers relating to assessment and collection, we premise, first, that the rule on this subject in each jurisdiction must be determined in the light of its own statute law; and decisions of California or other State Courts based on local statutes do not assist us in construing the Federal revenue acts, in which there is no merger of the two powers. The Federal revenue acts

here involved are those of 1918 and 1921. Section 250(*d*) of the Revenue Act of 1918 provides:

> "Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made."

The Revenue Act of 1921, Section 250(*d*) contains similar provisions. We quote from that Act:

> "(*d*) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax: and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits,

> or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act."

It will be seen that the two periods, although they run concurrently, are separately defined by each of these Acts. The separate character of the two provisions is illustrated by the clause of the 1921 Act which allows four years for making an assessment for 1921 or any subsequent year, and at the same time allows five years for the collection of the tax liability resulting from the assessment.

The Revenue Acts of 1924 and 1926 prescribe different periods for assessment and collection. Cf. Sections 277 and 278 of each of these Acts. There is in each Act, first, the provision for the assessable period. Next, we have the provision defining the period for collection, which is six years after the making of the assessment. Thus, under the two later Acts, the two periods run consecutively rather than concurrently. In all Acts, however, a clear distinction is made by the language used between the period for assessing and the period for collecting income taxes.

It will be conceded, we assume, that an assessment made under a waiver can have no greater efficacy than an assessment made under the statute within the statutory period. Assuming its validity for the moment, we premise that the incidents of the assessment made

in the present case under the waiver of November 14, 1922, are no more and no less than the incidents of an assessment that might have been made before the end of the statutory period. In either case the material question is this: Does the power to assess or the making of the assessment, seasonably, *ex proprio vigore* extend the statutory period for collection?

This Court has always recognized and given effect to the distinction between the exercise of the two powers, *i. e.*, the power to assess and the power to collect. In the cases of New York and Albany Lighterage Company *v.* Bowers, 273 U. S. 347, and Benjamin Russell *v.* United States, 278 U. S. 181, it appeared that no complaint could be made by the taxpayer regarding the time of assessment. Nevertheless, recovery by the taxpayers in those cases was allowed by this Court because the tax had been collected after the expiration of the statutory period for collection. In the Lighterage case, the question for decision was stated by the Court to be:

> "Where under the tax laws enacted prior to the Revenue Act of 1921, income and excess profits taxes were assessed within five years after filing return, does Section 250(*d*) of that Act bar collection by distraint proceedings begun after the expiration of the five-year period?"

This question was answered by the Court in the affirmative. One of the principles necessarily established by the decision was that power to collect was not one of the incidents of an assessment seasonably

made. If, then, the incidents of an assessment made under a waiver are the same as those of an assessment made under the statute, the conclusion is inevitable that, under the principle of the Lighterage decision, the power *to collect* is not one of the incidents of the power to assess conferred by waiver.

The same principle runs through the decision of this Court in the Benjamin Russell case.

If the power to collect was properly to be merged with the power to assess, there could have been no recovery in either of the cited cases.

In the more recent case of Florsheim Bros. Dry Goods Company, Ltd., *v.* United States, decided February 24, 1930, Vol. 7 of the Advance Opinions of the Supreme Court, 1929 Term, page 300, it was contended by the taxpayer (*a*) that the power to assess was barred at the time the *assessment* was made and (*b*) that the power to collect was barred at the time *collection* was made. These two contentions are discussed separately in the opinion of this Court, different provisions of the Revenue Acts being cited in each discussion. Different reasons are given for denying each of the contentions. If the decision of the lower Court in the present case is correct, much of the discussion in the Florsheim case was unnecessary. All that this Court need to have done was to decide that the power to assess existed at the time the assessment was made.

It may not be inappropriate to state here that the reasons for the denial of the taxpayer's contentions in the Florsheim case are inapplicable to the present case. In the cited case there was a *statutory* waiver. It con-

sented to the *determination, assessment, and collection* of the tax after the expiration of the statutory periods. Moreover, the assessment in the cited case was made after the passage of the Revenue Act of 1924. Consequently, the Court held the period for collecting the assessment was to be taken from that Act. Here, the assessment was made in February, 1924, and, therefore, before the passage of the Revenue Act of 1924. Under Section 278(*c*) of that Act, the provisions of Subdivision (*d*) of the same section giving six years for collection have no application to an assessment made before the enactment of the Act. This differentiation is expressly recognized in the following excerpt from the Florsheim decision:

> "'Section 278(*d*) prescribed the period of limitation for the collection of taxes applicable to all cases enumerated in that section, and Sec. 277, which expressly included taxes under the Act of 1918. The situations intended to be excluded from the limitations prescribed were carefully specified in Sec. 278(*c*): (1) Assessments or collections already barred before the passage of that act, and (2) assessments made and proceedings begun prior to that time. Neither of the cases at bar falls within those exceptions. Since, in both cases, assessment and collection were not barred on the enactment of the 1924 Act, and were made after that date, the section is applicable. Compare Russell *v.* United States, 278 U. S. 181, 73 L. ed. 256, 49 Sup. Ct. Rep. 121.'"

By the waiver petitioner agreed to waive the statutory limitation "as to the time within which assessments based upon such liability may be entered". So much he did, and no more. The language of the waiver is quite definite and certain. It needs no construction, as the meaning of the language employed is entirely clear. Under no rule of law known to us may this writing be so enlarged as to confer the power to collect upon administrative officers after the expiration of the collection period. Certainly, no such result may be obtained in the absence of evidence clearly establishing fraud or mistake in the preparation or execution of the document. There has been no pretense that either element is to be found in the present case.

The United States Board of Tax Appeals has consistently adopted the view for which we contend. For instance, in the case of Chicago Insulated Wire & Manufacturing Company, 10 B. T. A. 1195, it appeared that the tax had been assessed under a waiver of the exact form involved in the present case. There, as here, no collection waiver was given. The Board held that collection was barred by the statute, saying:

> "The written consent entered into between petitioner and the Commissioner expired April 1, 1924. The Commissioner made the assessment on March 25, 1924, which was within the period agreed upon. The amount assessed and now claimed by the Commissioner has never been collected. Since the five-year period within which the Commissioner might collect any amount from the taxpayer as a tax expired under the statute and the consent before the

> passage of the Revenue Act of 1924, collection of the proposed deficiency is now barred by the Statute of limitations. Ocean Accident & Guarantee Corporation, Ltd., 6 B. T. A. 1045; Theodore H. Wickwire, Jr., *et al.*, Executors, 10 B. T. A. 102; Bowers *v.* New York & Albany Lighterage Co., 273 U. S. 346."

The material facts of petitioner's case are identical with those of the cited case. In that case, the Board of Tax Appeals held that the right of *collection* was barred by the statute, even though the tax was assessed within the time specified in the waiver. A contrary ruling was made in petitioner's case by the Court below.

We therefore conclude that, the two powers—the power to assess and the power to collect—being separate and distinct under the revenue acts, to confer the one power does not imply the conferring of the other. If this conclusion be sound the power to collect the taxes here involved was barred at the time collection was made. This being true, under the doctrine of the Lighterage case, 273 U. S. 347, and the Russell case, 278 U. S. 181, petitioner is entitled to recover the amount so exacted of him.

THE COURT OF CLAIMS ERRED:

IN HOLDING VALID THE WAIVER OF NOVEMBER 14, 1922, GIVEN AFTER THE EXPIRATION OF THE STATUTORY PERIODS FOR ASSESSING AND COLLECTING THE ADDITIONAL TAXES HERE INVOLVED. SECTION 250(*d*) OF

THE REVENUE ACT OF 1921 CONTEMPLATES THAT WAIVERS SHALL BE OBTAINED BY THE COMMISSIONER OF INTERNAL REVENUE BEFORE THE EXPIRATION OF THE STATUTORY PERIODS.

(*a*) The Revenue Act of 1921 was enacted on November 23, 1921. The waiver was given on November 14, 1922. The power of the Commissioner of Internal Revenue to assess or collect additional taxes for 1914, the year here involved, expired prior to the passage of that Act. Subdivision E of the Revenue Act of 1913 provides in part:

> "That all assessments shall be made by the Commissioner of Internal Revenue and all persons shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this section or by existing law, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such person or persons immediately upon notification of the amount of such assessment."

Nearly seven years had elapsed from the date on which petitioner filed his 1914 return, before the Reve-

nue Act of 1921 became a law. Can it be said that that Act was intended to apply to cases in which the bar of the statute had fallen prior to its enactment?

From 37 *Corpus Juris*, 697, we take the following:

> "Extension of Statutes to Actions Already Barred.—A statute of limitations will not be construed so as to affect causes of action already barred, if such construction can reasonably be avoided, especially where the limitation in force when the cause of action accrued is a part of the right of action itself.
>
> "Revival by Statute of a Right of Action Already Barred by Limitations is an extreme exercise of legislative power which will not be deduced from words of doubtful meaning."

In Dyer *v.* Belfast, 88 Me. 140, it was said that when a remedy has been once barred by statute, a later enactment establishing a longer period of time in which the remedy may be enjoyed, will not be given a retroactive construction to revive the lost remedy unless that intention is affirmatively expressed in the act.

In Theis *v.* Beaver County, 22 Okl. 333, the Court held that a statute providing that a "set-off or counterclaim shall not be barred by the statutes of limitations until the claim of the plaintiff is so barred", did not revive a set-off barred prior to the passage of the act.

The disinclination of the Courts to give a retroactive effect to a statute which revives a power previously lost by lapse of time, is well illustrated by the case of Richards *v.* Carpenter (C. C. A. Sixth Circuit), 261 Fed. 725. Quoting from the syllabus of that case:

> "Where the three-year period in which the superintendent of banks might enforce the double liability of stockholders in a trust company, imposed by Banking Law N. Y. 1909, Sec. 196, expired prior to the amendment of April 16, 1914, to section 19, relating to the powers of the superintendent of banks, which thereafter became section 80, such amendment cannot affect the action already barred.
>
> "After right of action to enforce the double liability of stockholders in trust companies, imposed by Banking Law N. Y. 1909, Sec. 196, had been lost by the expiration of the three-year period prescribed by Code Civ. Proc. N. Y., Sec. 394, the extension of the period within which suit might be brought by subsequently enacted amendment of 1914, cannot be considered retroactive, and to revive the action."

It was argued, however, for the Government in the Court below that the intention to validate waivers given after the bar of the statute had fallen was apparent from the face of the section (Section 250(*d*) of the Revenue Act of 1921). That section, it was stated, refers to assessments to be made "under prior income * * * tax acts" or under the excise tax act of 1909. According to the contention, unless it had been intended that waivers for 1914 or earlier years should be valid, if given after the passage of the Revenue Act of 1921, the reference in the section to any act imposing taxes for years prior to 1916 would have been omitted.

The immediate question here is whether it was intended by the act that a waiver, given after November

23, 1921 (the date of its passage), should have the effect of reviving a power previously barred by the statute. In many cases, the power to assess and collect taxes for 1914 and earlier years may have been continued to and after that date (November 23, 1921) either by the filing of a common law waiver prior to the expiration of the period, *i. e.*, a waiver relating to assessment and collection, or by the failure to file a return when due. It is just as reasonable to infer that Congress intended that the section should apply to cases of that sort where the power still existed at November 23, 1921, as that it should serve to extend or permit the extension of the power after the bar had fallen.

(*b*) That doubt existed in the mind of Congress as to the validity of waivers given after the expiration of the statutory period, clearly appears in Section 506 of the Revenue Act of 1928. Subdivisions (*b*) and (*c*) of this section provide:

> "(*b*) Section 278 of the Revenue Act of 1926 is further amended by adding at the end thereof a new subdivision to read as follows:
>
> "'(*f*) Any agreement which would be within the provisions of subdivision (*c*) or (*d*) of this section but for the fact that it was executed after the expiration of the period of limitation extended by such agreement, shall be valid and effective according to its terms if entered into after the enactment of the Revenue Act of 1928 and before January 1, 1929.'
>
> "(*c*) The amendments made by this section to the Revenue Act of 1926 shall not be con-

> strued as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed."

The question of the validity of waivers given before May 29, 1928, the date of the enactment of the Revenue Act of that year, and after January 1, 1929, is thus left to the Courts for decision. The act in force when the waiver was filed in the present case is the Revenue Act of 1921; and, under Section 506 of the 1928 Act, its validity is to be determined under the 1921 Act.

In the case of Joy Floral Company *v.* Commissioner, 29 Fed. (2d) 865, the Court of Appeals of the District of Columbia had before it the question of the validity of a waiver given after the enactment of the Revenue Act of 1924. The lower Court in the present case held that there was no material difference between the provisions of the two acts (the Acts of 1921 and 1924) affecting the validity of a waiver given after the expiration of the statutory period. In the Joy Floral case, the Court of Appeals of the District of Columbia said:

> "Furthermore, section 278(*c*), *supra*, provides that the written consent for a later assessment shall not be operative, unless signed by the Commissioner as well as by the taxpayer. This provision plainly contemplates that the consent shall be executed at a time when the Commissioner still possesses the authority to make an assessment and when he may refuse to consent to any delay in making it. For it does not seem that the Commissioner's

consent would be deemed important after he has been barred by statutory limitations from making any assessment. This view is favored also by the grammatical construction of the words of sections 277 and 278, when construed together. The first section provides that the assessment shall be made within five years after the filing of the return. The second section provides that, if 'the Commissioner and the taxpayer have consented in writing' to a later assessment, the tax may be assessed at any time within the period agreed upon. The phrase 'have consented', as thus employed, fairly implies that a completed consent shall have been given before the expiration of the period first provided for. It may be added that this limitation is designed to provide for the orderly administration of the government's finances, as well as for the protection of the taxpayer. Such a purpose would not be subserved, if the Commissioner and the taxpayer could afterwards agree to the making of an assessment, utterly regardless of any time limitation."

In the later case of Florsheim Bros. Dry Goods Company *v.* United States, Vol. 7, page 300, of the Advance Opinions of the Supreme Court, 1929 Term, this Court had before it the question of the effect of a *statutory waiver* given seasonably under the Revenue Act of 1921. In the discussion of this question, the Court said:

"Stress is laid on the use of the words 'agree' and 'agreement' in the acts and regulations.

> But these are ordinary words having no technical significance. It is also urged that, unless a contract was intended, there is no reason why the consent of the Commissioner should have been required. But an otherwise plain meaning should not be distorted merely for the sake of finding a purpose for this administrative requirement. If a reason must be found, it exists in the general desirability of the requirement as an administrative matter. It serves to keep the Commissioner in closer touch with the matters which he is charged to administer. It avoids claims of improvident execution of waivers and unauthorized exactions by subordinates of the Department for the purpose of curing their own delinquencies. And it provides a formal procedure which is generally desirable for the Commissioner, collectors and subordinates in the Department. That other means might have been devised for the same purpose is of no significance."

It was thus held by this Court that the principal reason for the requirement that the Commissioner shall sign the waiver is an administrative one. To do so enables the Commissioner to keep in closer touch with the procurement of waivers by subordinates, to the end that abuses may be avoided. It is difficult to conclude that in exercising the discretion given to the Commissioner, to sign or not to sign the waiver—a discretion conferred on him for the good of the service and for the protection of improvident taxpayers—it was contemplated by Congress that the Commissioner should be called upon to decide between the revenue, on the

one hand, and considerations of orderly administration and protection of improvident taxpayers, on the other.

This consideration may be stated somewhat differently. So long as the tax is barred by limitation, it is lost to the Government. Collecting officers are properly vigilant and untiring in their efforts to collect all taxes believed by them to be due. Their attitude, when the collection of revenue is involved, is in no sense impartial in character. Are we to assume that Congress intended to leave to them a choice between correct procedure and protection of taxpayers, in the one case, and the collection of taxes, in the other?

To limit the period for assessing or collecting taxes imposes a limitation upon the power of administrative officials. They are creatures of the statute and after the expiration of the statutory period, *they have no lawful power to act.* The subject-matter here is the exercise of the sovereign power of taxation, a matter charged with a public interest. This situation is materially different from that which arises on a limitation statute that is to be waived or invoked by one citizen against another. Assuming the parties to be *sui juris*, only private rights are involved in a case of that sort and the statute or even laches may be waived at any time. There is in that case no public concern, viz., no precedent to be established which may affect other taxpayers, such as we have here where there is the question of the revival of the power of a taxing official, previously barred, to levy or collect taxes.

The Constitution confers upon Congress alone the power to lay and collect taxes. We do not contend that Congress may not extend the period for levying or collecting taxes. That question does not arise in the present case. Here, the question at issue involves the proper construction of the taxing act; and clearly the revival of a taxing power in the Commissioner of Internal Revenue, such as is here contended for by the Government, must be evidenced by language that is susceptible of no other reasonable construction. Our view is that Section 250(*d*) of the Revenue Act of 1921 does not meet that test.

In the case of the Pictorial Printing Company *v.* Commissioner of Internal Revenue, decided on February 28, 1930, not yet reported, the Circuit Court of Appeals for the Seventh Circuit had before it the identical question under discussion. The Court said:

> "But, apart from this, there is the question whether, in general, a statutory consent for determination of a tax, entered into after expiration of the period of limitation, upon proceedings for redetermination, assessment, or collection, has any validity. The Board of Tax Appeals held in its opinion in this case that such a consent was binding upon the taxpayer, and that a deficiency found thereunder was valid and collectible. Among others of the Board's opinions there was cited in support Joy Floral Company, 7 B. T. A. 800. It appears that upon review of that case by the Court of Appeals of the District of Columbia, that court reversed the decision of the Board, and held that such consent for extension was not effective, if entered

into after the period of limitation had expired. Joy Floral Co. *v.* Commissioner, 29 F. (2d) 865. This decision was followed in Spears & Co. *v.* Heiner, Collector, D. C. Pa. 34 F. (2d) 795; and by the District Court for the Middle District of Tennessee in Columbia Iron Works *v.* Brock, Collector, September 28, 1929. But in a more recent case, in the U. S. Court of Claims, Stange *v.* United States, November 4, 1929, a decision was reached in conformity with the views of the Board of Tax Appeals in its Joy Floral Co. decision.

"For the reasons stated in the said opinion of the Court of Appeals of the District of Columbia, and in the above cited cases in which it was followed, we are of opinion that the correct rule was there announced, and that the Commissioner takes nothing by a consent first entered into after the limitation had expired."

A copy of the entire opinion in the Pictorial Printing Company case is included in the appendix to this brief.

For these reasons, we respectfully request a reversal of the decision of the Court of Claims in the present case.

All of which is respectfully submitted.

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APPENDIX.

Section 250(d) of the Revenue Act of 1918.

"Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due."

Section 250(d) of the Revenue Act of 1921.

(*42 Stats. 265-266.*)

"The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of

the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act."

Section 277(a)(2) and Section 278(d) and (e) of the Revenue Act of 1924.

(*43 Stats. 299-300.*)

"SEC. 277. (*a*) Except as provided in section 278 and in subdivision (*b*) of section 274 and in subdivision (*b*) of section 279—

"(2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes', approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

"SEC. 278. (*d*) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after

the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

"(*e*) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act."

Section 277(a)(3) and Section 278(d) and (e) of the Revenue Act of 1926.

(*44 Stats. 58-59.*)

"SEC. 277. (*a*) Except as provided in Section 278—

"(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes', approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

"SEC. 278. (*d*) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

"(*e*) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (*a*) of section 274 of this Act."

Section E of the Revenue Act of 1913.

"That all assessments shall be made by the Commissioner of Internal Revenue and all persons shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery

thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this section or by existing law, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such person or persons immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of 5 per centum on the amount of tax unpaid, and interest at the rate of 1 per centum per month upon said tax from the time the same became due, except from the estates of insane, deceased, or insolvent persons."

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

OCTOBER TERM, 1929.

No. 4171.

PICTORIAL PRINTING COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Before Alschuler, Page, and Sparks, Circuit Judges.

OPINION OF THE COURT.

"The petition raises the question of the right of the Commissioner of Internal Revenue to redetermine in 1925 appellant's income tax for 1916, pursuant to a written consent for determination, etc., entered into after the expiration of the statutory limitation period of five years.

"The salient facts, as conceded, and as found by the Board of Tax Appeals in its findings on appeal, are:

"Taxpayer's return was filed February 28, 1917.

"August 13, 1923, while an Internal Revenue agent was at taxpayer's place of business to examine its returns for 1910 to 1919 inclusive, the agent, without referring to any limitation, informed the appellant that taxes would be assessed and payment required immediately, and that consent should be executed to provide time for an examination of returns; whereupon the agent presented, and appellant signed, an instrument of that date which provided that, pursuant to the statute, appellant and the Commissioner of Internal Revenue consent to a determination, assessment and collection of the income, etc., taxes due under any return made by taxpayer for the years 1910 to 1917 inclusive, irrespective of any period of limitations. It was signed also by the Commissioner and filed.

"It was testified that the taxpayer did not know the statutory period of limitation for 1916 had expired.

"Under date of January 26, 1924, appellee mailed appellant a so-called thirty-day letter, stating that over-assessments had been determined for the years 1910, 1911, 1912 and deficiencies found for the years 1913 and 1918 inclusive; and in this letter it was stated:

> " 'If in your opinion the additional tax indicated for the year 1918 is incorrect and you submit a protest against the action taken by this Unit, or an appeal to the Commissioner of Internal Revenue, it is necessary that you properly execute the enclosed form of waiver so that the additional tax indicated may not be placed in jeopardy.'

"This waiver or consent, dated February 2, 1924, provided for determination, etc., of income taxes from 1910 to 1918 inclusive, and stated that

> " 'This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitations as extended by any waivers already on file with the Bureau, within which assessments of taxes may be due for the year or years mentioned.'

It was signed by the taxpayer and the Commissioner, and filed February 6, 1924.

"In a letter of November 9, 1925, the Commissioner advised appellant of a deficiency in its 1916 tax of $1,615.60; and that pursuant to Section 274 of the Revenue Act of 1924 it was allowed sixty days within which to file an appeal to the United States Board of Tax Appeals. Appellant had filed no protest and made no contest as to the merits of the alleged deficiency for 1916, and there was no charge or claim that appellant's return for 1916 was false or fraudulent, or made with intent to evade taxes.

"Taxpayer then appealed, and the Board of Appeals decided against it.

"ALSCHULER, *Circuit Judge:*

"Concededly the right to take proceedings for the determination, assessment, and collection of appellant's 1916 tax terminated February 28, 1922, and when, a year and a half thereafter, the revenue officers appeared at appellant's place of business to investigate that return, there was no longer any right to institute any proceedings looking to the determination, levy, or collection of any further tax for that year.

"When the revenue officer then presented the waiver or consent for signature, the taxpayer had no liability on account of the tax for 1916; and when appellant was informed in effect that unless it was signed an emergency assessment would immediately be made and collected to protect the Government against possible deficiencies, the taxpayer, not knowing that the limitation had expired, signed it, evidently under the persuasive prospect of being required to pay at once, in advance of any investigation, whatever amount the Commissioner might demand to be paid.

"As respects the tax for 1916, with which alone we are here concerned, the parties did not deal on equal terms. The threat of immediate assessment and collection in advance of investigation, to protect the Government against a possible deficiency which at that time the Government had no right to determine, or levy, in our judgment so far partook of the nature of a duress as to render a waiver or consent so procured wholly inoperative as to that year.

"But, apart from this, there is the question whether, in general, a statutory consent for determination of a tax, entered into after expiration of the period of limitation, upon proceedings for redetermination, assessment, or collection, has any validity. The Board of Tax Appeals held in its opinion in this case that such a consent was binding upon the taxpayer, and that a deficiency found thereunder was valid and collectible. Among others of the Board's opinions there was cited in support Joy Floral Company, 7 B. T. A. 800. It appears that upon review of that case by the Court of Appeals of the District of Columbia, that court reversed the decision of the Board, and held that such consent for extension was not effective if entered into after the period of limitation had expired. Joy Floral Co. *v.* Commissioner, 29 F. (2d) 865. This decision was

followed in Spears & Co. *v.* Heiner, Collector, D. C. Pa. 34 F. (2d) 795; and by the District Court for the Middle District of Tennessee in Columbia Iron Works *v.* Brock, Collector, September 28, 1929. But in a more recent case, in the U. S. Court of Claims, Stange *v.* United States, November 4, 1929, a decision was reached in conformity with the views of the Board of Tax Appeals in its Joy Floral Co. decision.

"For the reasons stated in the said opinion of the Court of Appeals of the District of Columbia, and in the above cited cases in which it was followed, we are of opinion that the correct rule was there announced, and that the Commissioner takes nothing by a consent first entered into after the limitation had expired.

"This consent or waiver presents still another question. It was unlimited in its terms; whereas it is conceded that, under the applicable statutes, the consent should be for a limited time. The Board of Tax Appeals, in its opinion herein, concludes that such a consent is binding 'for a reasonable time', stating, 'if we had only the first waiver before us, we could not hold, on the evidence, that the time elapsed between its execution and the final determination was unreasonable.'

"If it be assumed that the Board is right in holding such unlimited waiver effective for a reasonable time, was a period of two and one-fourth years after August 13, 1923, reasonable under the record facts? At the time the taxpayer signed the consent six and one-half years had already passed since the return for 1916 was made, and at the very time of signing it revenue agents were engaged in investigating the taxpayer's books. In the Commissioner's 'thirty-day' letter of January 26, 1924, it was stated that deficiencies were found for the years 1913 to 1918, and still the letter announcing the redetermination of the 1916 tax was not sent until nearly two years thereafter. At no time

did appellant make any protest in regard to the merits of the alleged 1916 deficiency, and no controversy was pending respecting that year's tax whereby delay was occasioned. Under these circumstances, we cannot agree to the conclusion that unreasonable delay in making the determination does not appear from this record; but, on the contrary, from what is shown we conclude that the delay was decidedly unreasonable.

"As to the second consent, dated February 2, 1924, which was almost six months after the first, we deem it fair to say that even if the first consent was effective for a reasonable time, then, under the circumstances pointed out, with the revenue agents on the ground and no protest or opposition made to redetermination for 1916, a reasonable time had already expired when the second consent was given.

"But we believe the record fairly shows that the second consent, although in terms including the year 1916, did not in fact intend to include it, and ought not to be so considered. The Commissioner's letter which inclosed it stated that deficiencies had been found for the years 1913 to 1918. The 1918 taxes were not included in the first consent, which covered only the years 1910 to 1917. In the Commissioner's letter inclosing the second consent, after stating that deficiencies had been found for the years 1913 to 1918 inclusive, it was stated:

> " 'If in your opinion the additional tax indicated for the year 1918 is incorrect and you submit a protest against the action taken by this Unit, or an appeal to the Commissioner of Internal Revenue, it is necessary that you properly execute the enclosed form of waiver so that the additional tax indicated may not be placed in jeopardy.'

"This refers alone to the 1918 tax, which the prior consent did not cover, and sufficiently indicates that the purpose of this consent was to extend the time for the 1918 tax alone, leaving the others to stand upon the prior consent, which was applicable to all the years from 1910 except 1918.

"Of course, with the first consent inoperative, the second, even if held to cover the year 1916, would not justify the determination of November 9, 1925, since the second consent, by its limitation of one year, expired February 2, 1925.

"The decision of the Board of Tax Appeals is reversed and the cause is remanded with direction to sustain the taxpayer's appeal."

(3440)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 23

CHARLES H. STANGE, PETITIONER,

v.

THE UNITED STATES, RESPONDENT.

SUPPLEMENTAL AND REPLY BRIEF FOR PETITIONER.

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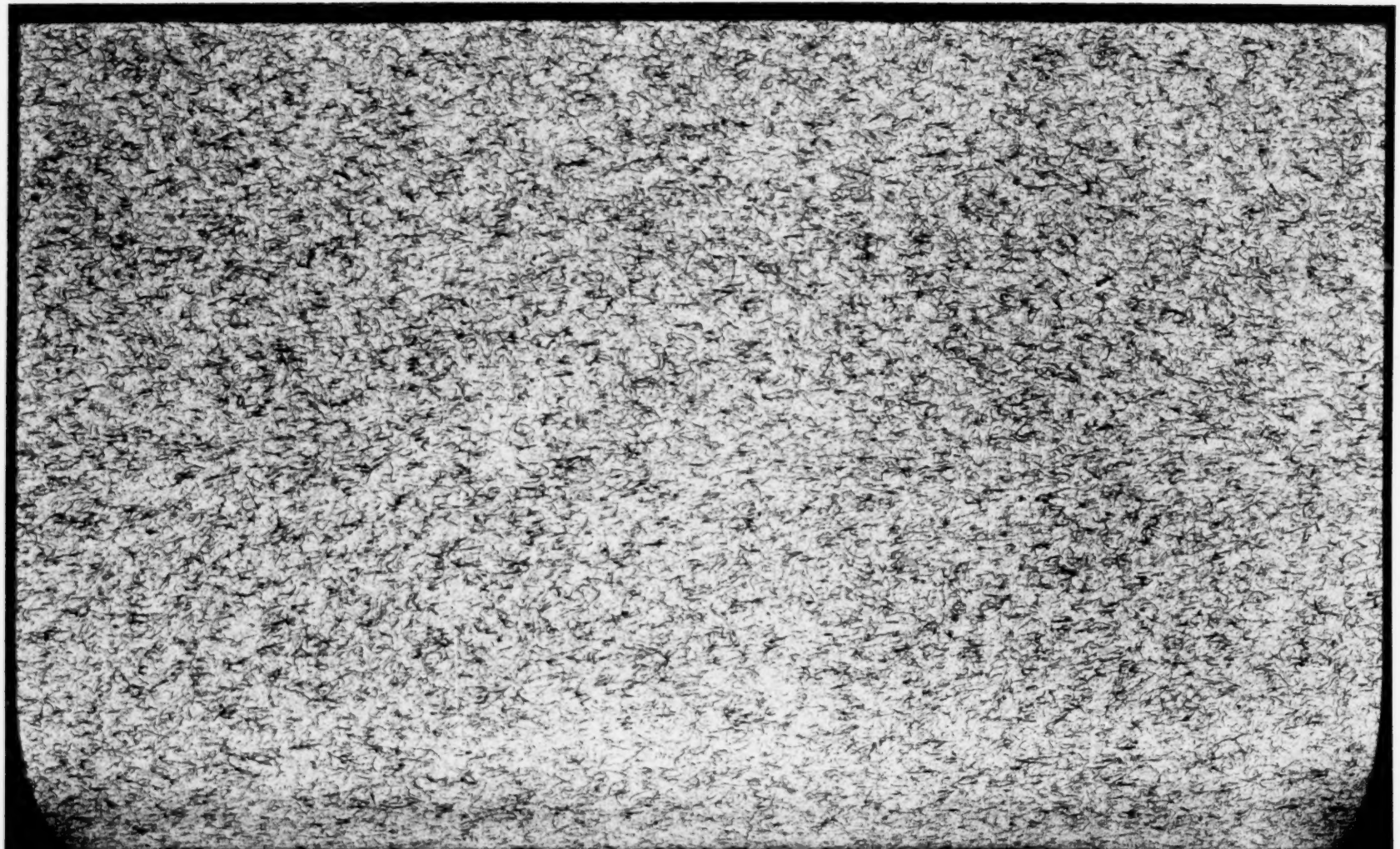

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CHARLES H. STANGE, PETITIONER,

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THE UNITED STATES, RESPONDENT.

SUPPLEMENTAL AND REPLY BRIEF FOR PETITIONER.

MAY IT PLEASE THE COURT:

We take the liberty of submitting this supplemental and reply brief (*a*) to refer to certain Court decisions promulgated after our original brief was prepared, (*b*) to reply to certain contentions presented in the brief for respondent, and (*c*) to discuss more in detail one or two points referred to in the original brief.

The errors stated in the assignment of errors will again be discussed in the order of their statement in the original brief for petitioner, page 3.

The italics of this brief, unless otherwise indicated, are ours.

The Court of Claims erred:

In holding that the waiver of November 14, 1922, extended the statutory period for making the additional assessment. It had no such effect because it was not a statutory waiver, i. e., its provisions did not conform to Section 250(d) of the Revenue Act of 1921.

Two rules suggest themselves at the outset of this discussion. The first is clearly stated in the case of Updike *v.* United States, 281 U. S. 489, 496, decided May 19, 1930, in this language:

> "It may be that the saving clause was not strictly necessary, but was inserted from excessive care to put the right of the taxpayer beyond dispute. In any event, we think this is the fair interpretation of the clause, and the one which must be accepted, especially in view of the rule which requires taxing acts, *including provisions of limitation embodied therein*, to be construed liberally in favor of the taxpayer. Bowers *v.* N. Y. & Albany Co., 273 U. S. 346, 349."

The second rule is well stated in Howbert *v.* Penrose, 38 Fed. (2d) 577-581 (C. C. A. Tenth Circuit), from which we quote:

> "The question is not free from doubt, but on the whole, we are of the opinion that the sufficiency of the claim for refund was not put in issue, and that the plaintiff is entitled to re-

> cover this tax. The defendant concedes that he is entitled to it on the merits; and while *'men must turn square corners when they deal with the Government'* (*Rock Island, etc., R. Co. v. United States*, 254 *U. S.* 141, 41 *S. Ct.* 55, 56, 65 *L. Ed.* 188) *the government ought to turn square corners when dealing with its citizens.''*

In the case cited by the Circuit Court of Appeals (Rock Island R. R. Co. *v.* United States, 254 U. S. 141) wherein the Court used the expression, "men must turn square corners when they deal with the Government," the question at issue related to the proper construction of Section 3226 of the Revised Statutes as amended. Did that section imperatively require the filing of a refund claim as a condition precedent to suit for an overpayment of taxes, even though the filing of the claim might in some cases be merely an "idle act" or "idle formality"? Your Honors gave effect to the language of the statute saying, in part: "At all events *the words are there in the statute* and the regulations, and the Court is of opinion that they mark the conditions of the claimant's right." So, in the present case the words "determination" and "collection" are in the statute (Section 250(*d*) of the Revenue Act of 1921, 42 Stats. 227-264) and effect should be given to them. In the cited case, also a tax case, compliance with the statutory provisions was required of the party charged thereby. We ask for the application of the same rule here.

Referring to a contention advanced by us in our original brief, counsel for respondent says (Respondent's brief, page 20):

> "This argument is ineffective when it is considered that all waivers given after the enactment of Section 250(*d*) of the Revenue Act of 1921 *supra* are 'statutory waivers' and that the terms of the statute must be considered in connection with every waiver."

And again on the same page of respondent's brief, referring to the Revenue Act of 1921, counsel says:

> "That act did not purport to revive any cause of action which was barred, but provided certain conditions under which the bar first created therein should not apply. The petitioner and the Commissioner of Internal Revenue complied with the conditions therein expressed."

There is here, we respectfully suggest, a misapprehension, unless we are to assume that Section 250(*d*) of the 1921 Act does not mean what it says. To create the power to assess after the expiration of five years from the filing of the return, there must be a written consent to a later *determination, assessment, and collection.* Here, there was at most a consent to a later assessment. Aside from the rule of construction favorable to taxpayers mentioned above and aside from the reciprocal duty of taxpayer and Government to turn square corners in dealing with each other, there was no compliance with the conditions of the excepting clause in the present case. Whether a waiver is a "statutory waiver," even though it be given after the enactment of the 1921 Act, depends upon its provisions. The statute requires a written consent to the per-

formance of three official acts. To say that a written consent to one of those acts is a statutory waiver, is to ignore the plain meaning and effect of the language of the enactment.

In the case of Lucas, Commissioner, *v.* Pilliod Lumber Company, 281 U. S. 245, decided April 14, 1930, it appeared that an unverified income tax return had been filed; and the question presented was whether, in view of the statute requiring verification, that return was sufficient to start the running of the statute of limitations. It was not contended that the return was otherwise insufficient, *e. g.*, that it did not give the Bureau of Internal Revenue all the information needed for a prompt determination of the tax liability. The Court held (page 249):

> "Under the established general rule a statute of limitation runs against the United States only when they assent and upon the conditions prescribed. Here assent that the statute might begin to run was conditioned upon the presentation of a return duly sworn to. *No officer had power to substitute something else for the thing specified.* The return so long as it remained unverified by oath of proper corporate officers did not meet the plain requirements. The necessity for meticulous compliance by the taxpayer with all named conditions in order to secure the benefit of the limitation was distinctly pointed out in Florsheim Bros., etc. *v.* United States, *supra.*"

Is it not a poor rule that does not work both ways? We need go no further than to call attention to the language of the decision itself: "No officer had power

to substitute something else for the thing specified." Here, no officer had power to substitute a waiver consenting to the performance of one official act where the statute specified a consent to the performance of three official acts, each of which is treated separately by the revenue acts, with varying provisions and limitations.

Unless, therefore, we may say that the clause under consideration is directory only, the conclusion is irresistible that the waiver in the present case is not sufficient to revive the power of assessment admittedly lost previously through the lapse of time. But, under the authorities, it cannot be said that any such provision of a taxing act is directory, only. The rule on this subject is stated in the leading case of French *v.* Edwards, 13 Wall. 506, 20 L. Ed. 702, cited with approval in Lyon *v.* Alley, 130 U. S. 184 and in other later decisions; also by Judge Cooley in his work on Taxation. In the French-Edwards case it was held:

> "There are, undoubtedly, many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when

> the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

The statute (Section 250(*d*) of the 1921 Act) limits the period for making assessments to five years after the filing of the return, with an excepting clause. The conditions of the exception are stated with care in the enactment: "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection of the tax." To revive the power previously lost, there must be a compliance with the plain provisions of this statute.

The Court of Claims erred:

In holding that the waiver of the period of limitation for making an assessment conferred also the power to make collection at any time thereafter. In each of the revenue acts the two powers are separate and distinct. The waiver of the provisions of the revenue acts relating to the assessable period does not confer the power to collect after the expiration of the statutory period for collection.

As pointed out in our original brief, the power to assess and the power to collect are separate and distinct powers, in our scheme of Federal income taxa-

tion. Notwithstanding this fact, the decision of the lower Court would combine the two powers into one. That this may not be done properly will be demonstrated, if we but consider the varying provisions of the several Revenue Acts granting and limiting the power to exercise one or the other of the two powers. It should be kept in mind, we suggest, that we are dealing here with the Federal income tax law, not the taxing act of any of the states whose scheme of taxation may differ widely from that under consideration.

The Board of Tax Appeals was created by Section 900 of the Revenue Act of 1924 (43 Stat. at L. 253-297). That act, as it related to the powers of the Board, was amended by the Revenue Act of 1926 (44 Stat. at L. 9-55). Section 1000 of the later act provides, in part:

> "If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall, for the purposes of this title and of the Revenue Act of 1926, be considered as its decision that there is no deficiency in respect of such tax."

If the power to assess *ex proprio vigore* includes the power to collect, why was it necessary for Congress to use the expression, "if the *assessment or collection* of any tax is barred * * *"? In point of fact, there are many cases where the taxpayer has been relieved of liability because the period of collection had expired, although it was conceded that the assessment had been made seasonably. See, for instance, New York & Albany Lighterage Company v.

Bowers, 273 U. S. 347, and Russell *v.* United States, 278 U. S. 181.

An interesting case on this point is that of the United States *v.* Updike, 281 U. S. 489, 496, decided May 19, 1930. In that case it appeared that no return had been filed and, consequently, that the tax could be assessed at any time. The assessment was in fact made in 1920. In 1927 effort was made to collect the tax by suit from the stockholders of the taxpayer, as transferees, under the trust fund doctrine.

In holding that the power to collect was barred, the Court clearly distinguished between the two powers, the power to assess and the power to collect. Indeed, in view of the facts of the case, the conclusion reached by the Court made necessary this differentiation.

In considering the cited case, it should be borne in mind that no return was filed for the taxpayer and, for that reason, the power to assess continued. That power was not barred even at the time of the rendering of the decision of this Court. Nevertheless, the Court held that the power to collect had been lost by inactivity for the statutory period.

Comparing the cited case with the present case, the failure to file a return in the cited case is the equivalent of the giving of the waiver in the present case, *i. e.*, each served to extend the assessable period. In the cited case it was held that even though the assessment had been made within the assessable period as extended, the power to collect was lost if not exercised within the *period for collection.* This conclusion was reached, it may be repeated, at a time when the power to assess was still in force.

In its material aspects, we suggest, the present case is closely analogous to the Updike case; and we respectfully ask for the application to the present case of the rule enunciated therein.

The Court of Claims erred:

In holding valid the waiver of November 14, 1922, given after the expiration of the statutory periods for assessing and collecting the additional taxes here involved. Section 250(d) of the Revenue Act of 1921 contemplates that waivers shall be obtained by the Commissioner of Internal Revenue before the expiration of the statutory periods.

(*a*) In the brief for respondent it is pointed out that taxes for 1915 and earlier years were barred from assessment prior to the passage of the Revenue Act of 1921, and, consequently, the waiver provision of Section 250(*d*) of that act, as applied to taxes for 1915 and earlier years, would be wholly inoperative if limited to cases where the bar had not fallen.

Section 250(*d*) is a general statute fixing the period of limitation not only for assessment but also for collection of taxes thereafter to accrue and also those theretofore accrued under earlier Revenue Acts. The language employed is general and it is perhaps not surprising that some of the provisions of the section may be found inapplicable to a particular case, for one reason or another.

The conclusion of counsel, however, rests upon an erroneous premise. The limitation period for assessment is "five years after the return was filed." Not

until the return has been filed does the statute begin to run. In many cases, no doubt, as in the Updike case *supra*, the period of assessment has been extended by the failure to file the return at the proper time.

There is another class of cases where the power to assess for 1915 and earlier years was in force at the date of the passage of the Revenue Act of 1921, viz., those in which proper waivers had been filed seasonably.

We infer that these two classes of cases were regarded by Congress as sufficiently large to justify the application to 1915 and earlier years of the general provisions of Section 250(*d*) of the 1921 Act.

(*b*) In our original brief we alluded to the material difference between the present case, involving a statutory liability, and the case of two citizens, *sui juris*, wherein private rights only were involved. We take the liberty of referring again to this subject.

Section 1106 of the Revenue Act of 1926 (44 Stats. 9-55) provided in part:

> "The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability * * *."

This section was repealed as of the date of its enactment, by Section 612 of the Revenue Act of 1928. In the case of the Peerless Woolen Mills Company, 13 B. T. A. 1119, the Board of Tax Appeals held that a waiver given after the bar of the statute was effective, was invalid if given while Section 1106 of the

Revenue Act of 1926 was in force. The basis of this ruling was, "that at the time the waiver in question was filed the remedy was not only barred but also the liability was extinguished * * *." This decision was promulgated on October 17, 1928, and, therefore, after the repeal of Section 1106 of the 1926 Act, by Section 612 of the 1928 Act.

Our view is that not only is this ruling sound, but that it applies also to waivers given before the enactment of the 1926 Act, such as we have here.

The contrary view, as stated in the brief for respondent, page 9, seems to be based upon the doctrine of Campbell *v.* Holt, 115 U. S. 620 and related cases. These authorities are distinguished from those we believe to be applicable here in the cases we will cite presently.

Taxes are liabilities created by statute. In the absence of a taxing statute, there is no liability. Moreover, the length, breadth, and thickness of the liability are to be measured by the statute.

These exactions differ essentially from debts or other contractual obligations resting upon some act or omission of the party to be charged. Nothing that the taxpayer may do or fail to do—the material facts having occurred—can affect the liability for taxes.

It should also be noted here that the statute defining the limitation period (Section 250(*d*) of the 1921 Act) refers directly to the act creating the liability, the Revenue Act of 1913. Under the authorities, the effect of this direct reference is the same as if the limitation provision was contained in the same act that created the liability. The question with which we are dealing here,

it will be recalled, is whether the bar of the statute affects not only the remedy but also the liability itself in cases where taxes are involved, they being liabilities created by statute.

The case of The Harrisburg, 119 U. S. 199, involved the right of the widow to sue for damages for wrongful death of her husband, after the expiration of one year, the limitation provision specified in the statute. The liability, if any existed, was a creation of the statute. The widow relied upon the fact that no such limitation period existed at admiralty law. This Court, however, held that the right of the widow to sue came from the statute and that the period of limitation must be taken therefrom. In the course of the opinion the Court said:

> "The statutes created a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. * * * Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

In Davis *v.* Mills, 194 U. S. 450, it appeared that the action had been instituted within the period fixed by the state statute creating the liability but after the period specified in an amendment of the statute. The

rule in which we are interested was stated by the Court in this language:

> "It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure, and as belonging to the *lex fori*, as affecting the remedy only, and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction, courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. The Harrisburg, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right."

In William Danzer & Company *v.* Gulf Railroad Company, 268 U. S. 633, it was held that where the period for presenting a claim against the carrier to the Interstate Commerce Commission had expired before the presentation of the claim, the provision of the Trans-

portation Act of 1920 that the period of Federal control should not be computed as a part of the limitation period, did not apply. Distinguishing cases of statutory liability from those involving contractual obligations only, the Court held:

> "We need not re-examine the doctrine of Campbell *v.* Holt, 115 U. S. 620, 20 L. ed. 483, 6 Sup. Ct. Rep. 209, as it is plain that case does not apply. That was an action on a contract for the recovery of money. By a state statute of limitations, the right of action had been barred. The statute was repealed before the action was commenced. It was held that the action could be maintained, and that such repeal did not deprive the debtor of his property without due process of law, in violation of the 14th Amendment. The decision rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the Statute of Limitations related to the remedy only, and that the removal of the bar was not unconstitutional. The opinion distinguishes the case from suits to recover real and personal property. That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act (The Harrisburg, 119 U. S. 199, 214, 30 L. ed. 358, 362, 7 Sup. Ct. Rep. 140), and those arising under

> the Federal Employers' Liability Act (April 22, 1908) chap. 149, 35 Stat. at L. 65, Comp. Stat. Sec. 8657, 8 Fed. Stat. Anno. 2d ed. p. 1208; Central Vermont R. Co. *v.* White, 238 U. S. 507, 511, 59 L. ed. 1433, 1436, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; Atlantic Coast Line R. Co. *v.* Burnette, 239 U. S. 199, 201, 60 L. ed. 226, 227, 36 Sup. Ct. Rep. 75, 17 N. C. C. A. 144; Kannellos *v.* Great Northern R. Co., 151 Minn. 157, 160, 186, N. W. 389; Jones *v.* Delaware, L. & W. R. Co., 96 N. J. L. 197, 114 Atl. 331. See also Davis *v.* Mills, 194 U. S. 451, 454, 48 L. ed. 1067, 1070, 24 Sup. Ct. Rep. 692. This case belongs to the latter class. Section 206(*f*) will not be construed retroactively to create liability. To give it that effect would be to deprive defendant of its property without due process of law, in contravention of the 5th Amendment."

The rule enunciated in these cases has been applied to the liability for income taxes. In Bashara *v.* Hopkins, 290 Fed. 592 (U. S. D. C. Texas), in so applying the rule, the Court said:

> "It is claimed that, if the plaintiff should pay the tax demanded and avail himself of the statutory provisions for refund, he would be denied recovery, even though able to show the proceeding for collection was begun after the expiration of five years, because the defense of limitation, when presented as a basis for recovery, would be denied; in other words, that limitation will avail him as a defensive pleading (and as an affirmative one in this case) but that it would not be available to him in a refund suit. It can-

not be assumed that the government would be deaf to the bar of limitation and the consequent illegality of an assessment or collection after such bar. In Meriwether *v.* Garrett, 102 U. S. 501, 26 L. Ed. 197, Chief Justice Waite said:

"'The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the Legislature.'

"In The Harrisburg, 119 U. S. 214, 7 Sup. Ct. 147, 30 L. Ed. 358, it was said:

"'The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within 12 months, and not otherwise. The time within which the suit must be brought operates as a limitation on the liability itself as created, and not on the remedy alone. It is a condition attached to the right to sue at all.'

"At page 1052, 25 Cyc. it is stated that the liability created by statute is a specialty and governed by limitations applying to specialties. In the case of Smythe *v.* New Providence Tp. (D. C.), 253 Fed. 824, the rule is stated that general statutes of limitation do not apply on liability created by statute, and it is reasoned that such liability is not a debt which has arisen under a contract, either express or implied, but is an obligation which is a creation of the statute.

"In the case of Phillips *v.* Grand Trunk Railway, 236 U. S. 662, 35 Sup. Ct. 444, 59 L. Ed. 774, where the Supreme Court had under consideration the rights of the shippers to recover from the carrier freight charges held to have been unreasonable by the Interstate Commerce Commission and the provisions of the Hepburn

> Act (Comp. St. Sec. 8563 *et seq.*) limiting the time within which claims of that nature can be asserted, it was held that the lapse of time, not only bars the remedy, but destroys the right. See, also, page 708, 37 Cyc.; Davis *v.* Mills, 194 U. S. 451, 24 Sup. Ct. 692, 48 L. Ed. 1067; Northern Pacific Railway *v.* Crowell (D. C.) 245 Fed. 668."

Upon these authorities, we reach the conclusion that, without regard to Section 1106 of the Revenue Act of 1926 (which is admittedly without application here) or its repeal, the bar of the statute of limitations in the present case not only affected the remedy but also extinguished the liability itself. If this conclusion be sound, under the rule expressed in the Peerless Woolen Mills case, 13 B. T. A. 1119, the waiver was ineffective to revive the statutory liability for income taxes of 1914.

All of which is respectfully submitted.

W. W. SPALDING,
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Washington, D. C.,
Counsel for Petitioner.

MASON, SPALDING & McATEE,
Same Address,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. ~~554~~ 23

CHARLES H. STANGE, PETITIONER.

v.

UNITED STATES OF AMERICA, RESPONDENT.

MOTION TO SET ASIDE PART OF LIMITATION OF ORDER AND MEMORANDUM IN SUPPORT THEREOF.

W. W. SPALDING,
Washington, D. C.,
Counsel for Petitioner.

MASON, SPALDING & McATEE,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 554

CHARLES H. STANGE, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

MOTION.

Petitioner now moves the Court as follows:

That the Court set aside so much of its order of March 3, 1930, as confines counsel to a discussion, in their briefs, of the questions involving the validity and effect of the waiver of the statute of limitations involved in this cause.

Petitioner submits herewith its memorandum in support of this motion.

W. W. SPALDING,
Counsel for Petitioner.

Tower Building, Washington, D. C.

1*e*

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 554

CHARLES H. STANGE, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

MEMORANDUM.

MAY IT PLEASE THE COURT:

The questions raised and decided by the lower Court include not only those arising under the statute of limitations, but also that relating to the original validity of the additional tax collected from petitioner. Was there at any time lawful authority for this imposition? This question goes directly *to the merits* of the enforced claim of the United States against petitioner for additional income tax for 1914.

The claim of the United States rests upon the assumption that petitioner received in 1914 a taxable dividend from the A. H. Stange Company, the Union Land Company, and or the Kinzel Lumber Company in the amount of $642,138.40. In fact, income taxes have been collected from petitioner on the basis of this assumption.

Aside from the questions relating to the statute of limitations, petitioner has at all times contended, (*a*) that the distribution made by the corporations named did not constitute a *taxable dividend* under the Revenue Act of 1913, and (*b*) that, in any event, the taxable element in the distribution should be limited to the earnings or profits of the corporations making the distribution, at the time of distribution. The latter contention, if sustained, would effect a reduction of the taxable income from $642,138.40 to $140,318.27.

In granting the writ of certiorari the Court annexed the limitation that counsel shall confine themselves, in the briefs and in oral argument, to the questions involving the validity and effect of the waiver of the statute of limitations. We respectfully ask for a reconsideration of this limitation as it relates to the briefs to be filed in the cause.

The ground of the application for the writ, so far as the validity of the tax itself was concerned, was that the decision of the lower Court was in "conflict with the decisions of this Court in Mobile & Ohio Railway Company *v.* Tennessee, 153 U. S. 486, and Lynch *v.* Turrish, 247 U. S. 221, and with the implication of the decisions of this Court in the Lynch-Hornby case, 247

U. S. 339, the Phellis case, 257 U. S. 156, and the Rockefeller case, 257 U. S. 176."

The application thus conformed to Paragraph 5 of Rule 35, which lists as one of the grounds for the writ that will be considered by this Court a situation where the lower Court "has decided a Federal question in a way probably in conflict with applicable decisions of this Court." Cf. Paragraph 6 of Rule 38. We respectfully suggest that this provision of the rule is applicable with special force to a case where, as here, the writ has been issued and the decision of the lower tribunal as it relates to two of the questions involved, is to be reviewed by this Court. We take the liberty of submitting these considerations:

1. The question of the inherent right or wrong of the claim involved in any litigation is always a matter of concern to the Court when the right or wrong of the claim has been properly put in issue. Justice reflects the right or wrong of claims advanced by the parties and it is the right or wrong of the Government's claim that is involved in the present litigation. It is most appropriate, we suggest, that this question of inherent right or wrong be decided by this Court.

2. The question of the legal liability to a Federal tax—a liability that implies the exercise of the sovereign power of taxation—is one that is peculiarly within the province of this Court to decide. Only by the exercise of this jurisdiction may the taxpayer be protected from the exercise of assumed but mistaken power on the part of the taxing officials. The limits

of the power of the general government to lay and collect taxes are prescribed by the Constitution. To keep the taxing officials within those limits is, we respectfully suggest, one of the important functions of this Court. If this consideration is applicable to the questions arising under the statute of limitations, it is applicable *a fortiori* to the question of the original validity of the tax.

Coming to the merits of petitioner's contention as to the inherent right or wrong of the claim of the United States, to us it seems almost axiomatic that the taxable element of a dividend is limited to the corporate earnings or profits distributed to the stockholders. So, it was decided by this Court in Mobile & Ohio Railway Company *v.* Tennessee, 153 U. S. 486, and Lynch *v.* Turrish, 247 U. S. 221. Petitioner's position on this subject is also supported by the implication of Lynch *v.* Hornby, 247 U. S. 339, the Phellis case, 257 U. S. 156, and the Rockefeller case, 257 U. S. 176. Indeed, we confidently submit that no decision of this Court can be found which holds to be taxable any corporate distribution which was not made out of corporate earnings or profits.

The decision of the lower Court to be reviewed herein holds that the taxable element in a dividend is not confined to earnings or profits of the distributing corporations. Hence, the conflict with the decisions of this Court.

As shown by the findings of fact of the Court below (Finding XII), the Commissioner of Internal Revenue ruled that the corporate distribution here involved

was in the amount of $4,494,968.81 and that one-seventh thereof (petitioner's proportion of the outstanding stock of the distributing corporation), or $642,138.40, should be taxed to petitioner. The only corporation of the three concerned in the transaction that had any accumulated earnings or profits (earned surplus) at the distribution date was the A. H. Stange Company. Excluding unrealized appreciation of timber lands, its total earned surplus at that time was $982,227.93 (Finding VI). That amount and no more may be regarded as constituting a taxable dividend, if the taxable element is to be limited to the earnings or profits of the distributing corporation. Nevertheless, the Commissioner of Internal Revenue ruled, and the lower Court approved the ruling, that a taxable dividend of $4,494,968.81 resulted from the distribution. Of the earnings or profits actually distributed, petitioner received one-seventh thereof, or $140,318.27, which may be compared with $642,138.40, the amount actually taxed to him.

It does not answer to say that in addition to its earned surplus the distributing corporations also had on hand a large amount of unrealized appreciation of timber lands. Such unrealized appreciation is not *earnings or profits* within the meaning of revenue legislation. As expressly said by this Court in the Lynch-Turrish case, 247 U. S. 221:

> "The timber lands were the property, capital, and capital assets of their legal and equitable owner, and the enhancement of their value during a series of years 'prior to the effective date of an income tax law, although divided or dis-

> tributed by dividend or otherwise subsequent to that date, does not become income, gains, or profits taxable under such an act'."

Nor does it answer to point to the fact that, instead of distributing the appreciated assets in kind, the Union Land Company and the Kinzel Lumber Company issued to the stockholders their debentures based on the appreciated value of such assets. If the assets had been distributed in kind, the taxable element would be limited to the earnings and profits of the distributing corporation; and the material aspects of the case are not altered because obligations of the distributing corporation predicated on the appreciated value of the assets were distributed. In either case, the ultimate question is this: What was the maximum amount of earnings or profits of the distributing corporation transferred to the stockholders, *i. e.*, earnings or profits as those terms are understood in revenue legislation? Any other view might lead to the conclusion that *every* distribution of a corporation to its stockholders constituted a taxable dividend under the Revenue Act of 1913. In construing that Act, however, this Court, in the Phellis case (257 U. S. 156), said:

> "Disregarding the slight looseness of construction, we interpret 'gains, profits and income derived *from* * * * dividends', etc., as meaning not that everything in the form of a dividend must be treated as income, but that income derived *in the way* of dividends shall be taxed."

(The italics appear in the opinion.)

The only difference material here between the Revenue Act of 1913 and subsequent Revenue Acts is in the requirement of the later Acts that corporate distributions, to be taxable, must be made out of earnings or profits accrued subsequent to March 1, 1913. The provision as to the time of accrual is omitted from the Revenue Act of 1913. It is true of that Act, just as it is true of the later Acts, that the taxable element in any such distribution is limited to the corporate earnings or profits passed to the stockholder—in the case of the later Acts, earnings or profits since March 1, 1913; in the case of the earlier Act, earnings or profits of any period, but always earnings or profits.

The Income Tax Amendment to the Constitution permits the taxation of income, not capital; and it has been held by this Court in the Lynch-Turrish case (247 U. S. 221) that a corporate distributon of unrealized appreciation accrued prior to the effective date of the Amendment is not *income* to the recipient stockholder. It is merely a return of a part of his *capital* investment in the stock of the distributing corporation.

Concluding this memorandum, we respectfully request a rereading by the Court of what is said on this subject at pages 14-20 of the brief for petitioner on the application for a writ of certiorari in the present case.

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Tower Building, Washington, D. C.

MASON, SPALDING & McATEE,
Of Counsel.

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No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1929

CHARLES H. STANGE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 554

CHARLES H. STANGE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the granting of the writ in this case.

The petition for certiorari presents several questions. The one of prime importance, a review of which by this Court would be justified in view of the divergence of opinion thereon, is whether a "consent in writing" waiving the period of limitations upon the assessment of taxes for the year 1914 is valid and effective within the meaning of Section 250 (d) of the Revenue Act of 1921, when such "consent in writing" was executed after the period of limitations had already expired.

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Section 250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, so far as material, provides:

> The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *.

In *Joy Floral Co.* v. *Commissioner of Internal Revenue,* 29 F. (2d) 865, the Court of Appeals of

the District of Columbia held that a waiver executed after the limitation period had run failed to comply with the requirements of Section 278 (c) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 300, which permits the later assessment of taxes where both the Commissioner and the taxpayer "have consented in writing." Although holding that the quoted words were "merely a paraphrase" of the word "consent," as used in Section 250 (d) of the Revenue Act of 1921, *supra*, the Court of Claims in the instant case refused to follow the decision of the Court of Appeals in the *Joy Floral Co. case* because it did not agree with the reasoning of the court in that case. (R. 35.) While the two cases are distinguishable on the facts, in that in the *Joy Floral Co. case* the taxpayer, in consenting to the waiver, was led into the mistaken belief that the period of limitations had not run by an erroneous statement in a letter received from the Deputy Commissioner of Internal Revenue, the Court of Appeals nevertheless came to the conclusion that the waiver was invalid irrespective of the element of mistake. The divergence of opinion between the two courts is therefore not avoided by the absence of that element in the instant case.

Many cases are now pending before the Bureau of Internal Revenue involving waivers executed after the running of the limitation periods. The disposition of these cases awaits an authoritative decision. The same question is also presented in the

following cases, now pending in Circuit Courts of Appeals: *Pictorial Printing Co.* v. *Commissioner of Internal Revenue* (C. C. A. 7th); *W. P. Brown & Sons Lumber Co. and Brown Brothers Land & Lumber Co.* v. *Commissioner of Internal Revenue* (C. C. A. 6th); *Heiner, Collector,* v. *Spear and Co.* (C. C. A. 3d).

Another question which arises in connection with the waiver in the instant case is whether it conferred upon the Commissioner of Internal Revenue power not only to *assess* but also to *collect* the tax after the expiration of the statutory period. Although apparently executed with the intention of complying with the provisions of Section 250 (d) of the Revenue Act of 1921, *supra,* which refers to the "later determination, assessment, and collection of the tax," the waiver expressly extended only the time for "assessment." (R. 25.) The Court of Claims held that "the parties evidently intended that the word 'assessment' should also cover the collection of the tax," as otherwise the execution of the waiver "was an idle performance." (R. 33.) A number of cases are pending in the Bureau of Internal Revenue in which this question is present, and a decision by this Court on this point is accordingly desirable.

We submit that the remaining questions presented in the instant case do not, of themselves, merit the consideration of this Court. Briefly, they relate to the transfer, by one corporation, to two

newly organized corporations, of certain assets out of the surplus of the transferor corporation, the value of which was credited on the books of the transferee corporations to the stockholders, who were the same in all three corporations. Appreciation in the value of corporate assets and earnings which accrued to the transferor corporation prior to March 1, 1913, were included in the surplus. There was no retirement of any part of the capital stock of the transferor. The stockholders withdrew a part of the amounts so credited, and received stock and debenture notes covering the balance. (R. 17–24.) Upon these facts, the Court of Claims held that the Commissioner properly taxed as a dividend to each stockholder his proportionate interest in the value of the assets so transferred and credited. (R. 29, 30.) The decision in this respect follows the views expressed by this Court in *Rockefeller* v. *United States,* 257 U. S. 176, and *Lynch* v. *Hornby,* 247 U. S. 339. The Court of Claims also held that the corporate distribution upon which the tax was imposed was not a gift (R. 31), and, further, that the tax should be based upon the fair value of the assets transfered, and not upon the value of the assets as shown upon the books of the donee corporation. (R. 31–32.)

While we do not oppose a review of the first two questions referred to herein, we submit that the decision of the Court of Claims on the other questions raised in the petition for certiorari was correct and

that they are not of sufficient importance to warrant consideration by this Court. We consequently suggest that if the Court decides to issue the writ, its review be limited to the questions involving the validity and effect of the waiver. (*Cf.* order of November 4, 1929, in *Danovitz* v. *United States*, No. 424, present term.)

Respectfully submitted.

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FEBRUARY, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1929

CHARLES H. STANGE, PETITIONER

v.

THE UNITED STATES

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE MOTION OF PETITIONER TO SET ASIDE PART OF LIMITATION OF ORDER GRANTING A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 554

CHARLES H. STANGE, PETITIONER

v.

THE UNITED STATES

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE MOTION OF PETITIONER TO SET ASIDE PART OF LIMITATION OF ORDER GRANTING A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

On March 3, 1930, the Court granted the petition for a writ of certiorari to the Court of Claims in this cause—

> with the limitation, however, that counsel shall confine themselves, in the briefs and in oral argument, to the questions involving the validity and effect of the waiver of the statute of limitations executed in this cause.

The petitioner now seeks to have this Court revoke that part of its order restricting the scope of

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the briefs and the argument. The United States opposes this motion.

The arguments and contentions advanced by the petitioner in its motion have already been considered by the Court as they were fully presented in the petition for writ of certiorari and also in the petitioner's brief in support thereof. They were also discussed in the Government's brief filed in this Court.

The only issue of general importance in this case is the question of the validity of the waiver executed by the petitioner and the Commissioner of Internal Revenue extending the statutory period of limitation upon the assessment of the tax.

The motion of the petitioner should be denied.

Respectfully submitted.

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CHARLES B. RUGG,
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CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
JOSEPH H. SHEPPARD,
Attorney for the United States.

APRIL, 1930.

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No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1929

CHARLES H. STANGE, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 554

CHARLES H. STANGE, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 26–35) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered November 4, 1929. (R. 35.) Petition for writ of certiorari was filed January 3, 1930, and the writ was granted March 3, 1930. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Where a written consent is executed by the taxpayer and the Commissioner of Internal Revenue, under the provisions of Section 250 (d) of the Revenue Act of 1921, *infra,* extending indefinitely the period of limitations upon the assessment of income taxes for the year 1914, is such consent valid when given after the expiration of the period of limitations provided in that section?

2. Where the written consent, by its terms, agrees only to a later "assessment" of the taxes, does it also apply to the "collection" thereof?

STATUTES INVOLVED

The Revenue Act of 1921, c. 136, 42 Stat. 227, 265, so far as material, provides:

> SEC. 250. * * * (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner

and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *.

STATEMENT

On February 19, 1915, the petitioner filed his Federal income-tax return for the calendar year 1914, reporting a taxable income of $824.08 and a tax thereon of $8.24, which was paid. (R. 17.)

On or about November 14, 1922, the petitioner executed and filed with the Bureau of Internal Revenue a written instrument, which, on or about March 16, 1923, was approved and signed by the Commissioner of Internal Revenue. The instrument is in the following form (R. 25):

> C. H. Stange, of Merrill, Wisconsin, in consideration of the assurance given him by officials of the Income Tax Unit of the Bureau of Internal Revenue that his liability for all Federal taxes imposed by the Act of Congress approved October 3, 1913, and also by the act of Congress approved September 8, 1916, as amended by the act of Congress approved October 3, 1917, on his net income received from all sources in the year ended

December 31, 1914, and in the year ended December 31, 1917, respectively, shall not be determined except after deliberate, intensive, and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that the above-named individual does not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against him for the said years by the officials of the Income Tax Unit.

[STAMP.] C. H. STANGE.

Approved March 16, 1923.

D. H. BLAIR.

Commissioner of Internal Revenue.

MERRILL, WISCONSIN, *November 10, 1922.*

The Commissioner of Internal Revenue determined that the petitioner's taxable income for the year 1914 was $642,138.40 in addition to that reported, and in February, 1924, assessed thereon an additional tax of $28,992.55, which was paid on March 19, 1925, together with interest in the sum of $1,787.21, or a total of $30,779.76. (R. 25–26.)

On June 8, 1927, the petitioner filed a claim for the refund of this $30,779.76, on the ground that the collection thereof was barred by the statute of limitations at the time of payment. (R. 26.) No action was taken on this claim (R. 26), and petitioner brought suit against the United States in the Court of Claims, which entered a judgment dismissing his petition. (R. 35–36.)

SUMMARY OF ARGUMENT

I. The general rule that a beneficiary under a statute of limitations may waive the benefit after the bar of the statute has intervened, is applicable to this case. A statute of limitations, as a general rule, operates on the remedy, but does not extinguish the liability. The plea of the statute of limitations is a personal privilege which may be waived. In imposing the limitations of Section 250 (d) of the Revenue Act of 1921 upon the Government's right to determine, assess and collect taxes, Congress clearly intended to sanction the application of common law principles of waiver. Although there is a conflict of opinion in the Federal courts upon the precise point, we submit that the better reasoning supports our contention that a waiver executed after the expiration of the statutory period is valid and operative under the statute.

II. The fact that the consent did not expressly refer to the collection of the tax is immaterial. It was executed under authority of Section 250 (d) of the Revenue Act of 1921, which authorized consents for determination, assessment, *and* collection. This section must be considered in connection with the written consent. The intent of the parties to the instrument is clear. It would be unreasonable to assume they entered into an agreement with the thought that it would authorize the assessment of a tax, but would not allow its collection.

ARGUMENT

The order of this Court granting the issuance of a writ of certiorari to review the determination of the Court of Claims in this case contained the following limitation upon the scope of the issues to be presented:

> * * * counsel shall confine themselves, in the briefs and in oral argument, to the questions involving the validity and effect of the waiver of the statute of limitations executed in this cause.

I

THE WAIVER SIGNED BY THE TAXPAYER AND THE COMMISSIONER ON NOVEMBER 10, 1922, AFTER THE EXPIRATION OF THE PERIOD OF LIMITATION IMPOSED BY SECTION 250 (d) OF THE ACT OF 1921, WAS EXPRESSLY AUTHORIZED BY THAT SECTION AND EFFECTIVELY WAIVED THE LIMITATION

Prior to the enactment of the Revenue Act of 1921, there was no statute of limitations in effect barring the collection, by suit, of taxes for the year 1914. *Bowers* v. *New York & Albany Co.*, 273 U. S. 346, 350. The only limitation upon the collection of such taxes was contained in Section II, paragraph E, of the Act of October 3, 1913, c. 16, 38 Stat. 114, 169. The requirement of that paragraph that the discovery of the deficiency must be made within three years related only to collection *by assessment* and did not apply to the collection of a deficiency by suit. If the discovery of the deficiency was within the three-year period, the tax could be assessed and collected at any time thereafter. But

where collection was enforced through suit it was not incumbent upon the United States to show that the discovery of the taxes had been made within the three-year period. *United States* v. *Ayer,* 12 F. (2d) 194, 200, and cases cited therein. The limitation contained in Section 9 (a) of the Revenue Act of 1916 is the same as that contained in the Act of October 3, 1913, *supra,* and did not affect petitioner's rights. (c. 463, Sec. 9 (a), 39 Stat. 756, 763.) The limitation provided in the Revenue Act of 1918 was not in terms retroactive and therefore applied only to taxes assessed under that Act (c. 18, Sec. 250 (d) 40 Stat. 1057, 1083).

In providing a five-year period of limitation upon the collection of taxes, the Revenue Act of 1921, in Section 250 (d), *supra,* specified that that period of limitation should apply to all prior Revenue Acts including the Act of August 5, 1909. In the same sentence of the section imposing this limitation, the following qualification of the limitation is prescribed:

> unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax;

This was the first time that Congress by statute referred to the waiving of any statute of limitations applicable to the collection of taxes. It is manifest that the period of limitation referred to in Section 250 (d), *supra,* is the very limitation prescribed in the same section of the Act and in the same sentence

of that section, providing for the waiver. Thus the statute which in terms applies to returns filed more than five years before its enactment barred the assessment of taxes under such returns unless the requisite consent should thereafter be given. That in this respect the law was prospective in effect can not reasonably be doubted, because there was no such prior limitation, and therefore no occasion for such consent before its enactment. Consequently consents given after its enactment avoid the bar in cases more than five years old when the Act was passed, and it follows that the very language of the statute contemplates an effective consent given after the period of limitation has expired. Any other interpretation deprives the qualifying words of any sense or meaning in their application to tax returns filed more than five years before the Act of 1921 was passed, and this in the face of its declared intention that the limitation, with its qualification dependent upon consent, shall apply in such cases. The case at bar is such a case.

In support of the contention that Section 250 (d) of the Revenue Act of 1921, *supra,* authorized the taxpayer and the Commissioner of Internal Revenue to consent, after the enactment of that provision, to the determination, assessment, and collection of any tax due under the Revenue Act of 1921 or any prior Revenue Act, the grammatical construction of the section is important. The word "consent" unquestionably denotes present or future

action and not past action; and in the absence of words requiring "consent" before the period of limitation expires, it should be thus interpreted.

The position of the Government in this case is not unfair. It is the general rule that a beneficiary under a statute of limitations may waive the benefit after the bar of the statute has intervened. A statute of limitations operates on the remedy but ordinarily it does not extinguish the right, and a claim which is barred, while it ceases to be a legal obligation, remains a moral one. The debt is not necessarily obliterated although the remedy to enforce collection is barred. *Campbell* v. *Holt,* 115 U. S. 620; *Sanger* v. *Nightingale,* 122 U. S. 176. It is a statute of repose designed not merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of things may have been forgotten. *Gillingham* v. *Brown,* 178 Mass. 417.

The plea of the statute of limitations has been held to be a personal privilege of which a party may avail himself or not as he chooses. (*Sanger* v. *Nightingale, supra.*) In the case of *Bank* v. *Kimble,* 76 Ind. 195, the Supreme Court of the State of Indiana said (p. 203):

> The mere fact that a claim is old is no reason why it should not be paid. The law allows a man to be honest and to pay an honest debt however stale and ancient it may be.

> He may interpose the statute of limitations, but he may waive it also.

If one individual who is indebted to another may waive the bar of the statute of limitations after it has intervened, certainly the same rule may fairly be applied to a citizen indebted to his sovereign. It would be a strange anomaly of law if in minor affairs of business the bar of the statute may be waived for the benefit of individual creditors but that it can not be waived by a citizen for the benefit of the Government. In the absence of statutory authority a taxpayer may waive the statute of limitations and pay the tax. Yet it is urged in the case at bar that the specific authority granted by Congress to taxpayers to waive limitation curtailed or restricted existing rights instead of defining or regulating those already possessed. We submit that in imposing the limitations of Section 250 (d) of the Revenue Act of 1921 upon the Government's right to determine, assess and collect taxes, Congress clearly intended to sanction the application of common law principles of waiver. This was the obvious purpose of the qualifying clause, which must be read in qualification of any expression in the section which might be thought mandatory and therefore to exclude the possibility of waiver.

As the Court of Claims said in the instant case (R. 34–35):

> In the absence of a statutory provision either before or after the running of the statute of limitations, the taxpayer could

> by a mere oral statement waive the running of the statute. Even after the running of the statute, the moral obligation to pay any taxes that were properly levied would be a sufficient consideration for the waiver. * * * To hold that the statute requires the commissioner to consent to the waiver before the expiration of the period of limitation is to engraft upon the statute something which certainly is not contained within its provisions nor, as we think, is there any reason to infer that such was the intent of Congress.

In the case of *Perkins* v. *Dyer,* 71 Md. 421, the Court of Appeals of Maryland, in considering an issue identical in principle with that here presented, said (p. 423):

> Now prior to the Act of 1852, chap. 75, and the Act of 1874, chap. 483, there was not, as we all know, any statute of limitations applicable to the collection of taxes, and the object of these Acts was to prescribe a time within which county and city taxes should be collected, and, unless collected within that time to allow the party from whom they are demanded, the *privilege* of *pleading the provisions of* the *Act in bar* of *their recovery.* These Acts are nothing more or less, than statutes of limitation applicable to the collection of county and city taxes, and founded on the same reasons and policy as all other statutes of limitations are founded, and must be construed in accordance with the settled rules which govern the construc-

> tion of such statutes. This being so, a promise on the part of the taxpayer to pay such taxes, made after the expiration of the time prescribed, must be held to take them out of the operation of the statute.

In *Parchen* v. *Chessman*, 49 Mont. 326, the Supreme Court of Montana, passing upon a statute providing that "anyone may waive the advantage of a law intended solely for his benefit," said (p. 335):

> This provision does not describe the *time when* nor the *mode by which* the waiver may be made effective, nor does it impose any restriction or limitation upon the right of waiver. It must therefore be assumed that the party desiring to waive his right is free to do so *in any way and at any time he chooses.* (Italics ours.)

That such consents do not require a supporting consideration is clear. In *Loewer Realty Co.* v. *Anderson* (C. C. A. 2d), 31 F. (2d) 268, the court said (p. 270):

> It is objected that the waiver was without consideration, *but the statute requires nothing but a consent,* without mentioning consideration, * * *. (Italics ours.)

See also *Florsheim Bros. Co.* v. *United States,* 280 U. S. 453, 466.

On the precise question under consideration there has been a conflict of opinion in the Federal courts.

The petitioner relies upon the case of *Joy Floral Co.* v. *Commissioner* (App. D. C.), 29 F. (2d) 865 Undoubtedly there are expressions in the opinion of the court which support his contention, but the facts in that case are clearly distinguishable from the present case. That case involved Section 278 (c) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 300; and the court construed the words in that statute "*have consented* to the assessment" to relate only to an agreement made prior to the expiration of the five-year period. The court's opinion stated (p. 867) that the taxpayer was led into the belief that the limitation had not expired by the affirmative and erroneous statement in a letter from the Deputy Commissioner that the statute had not then but would presently expire. The court held, therefore, that the taxpayer did not intend to waive the rights which had accrued to it, and that the execution of the consent had been procured by the erroneous statement by the Deputy Commissioner. This appears to be the more substantial basis for the court's decision in that case. In the present case the element of misrepresentation does not exist.

The *Joy Floral case* was followed in *Pictorial Printing Company* v. *Commissioner* (C. C. A. 7th), decided February 28, 1930, not yet officially reported. In the latter case, the court emphasized the fact that the revenue agent had threatened immediate assessment and collection, although the right to collect had already expired. The court held

that the threat partook of the nature of duress, and undoubtedly attached weight to it in reaching its conclusion. The threat was tantamount to deceit and misrepresentation, and the court held the waiver invalid. With little discussion it also apparently applied the reasoning of the court in the *Joy Floral case* to the provisions of Section 250 (d) of the Act of 1921.

In *Chicago Railway Equipment Company* v. *Commissioner,* decided March 27, 1930 (not yet officially reported), the Circuit Court of Appeals for the Seventh Circuit without discussion held that a waiver executed after the statute had run was invalid. As it was executed on December 10, 1925, the provision of the 1924 Act, rather than that of the 1921 Act, must have been involved; but there is no indication that the court would construe the two provisions differently. The case involved no element of misrepresentation or duress.

In *W. P. Brown & Sons Lumber Company* v. *Commissioner,* the Circuit Court of Appeals for the Sixth Circuit, in a well considered opinion, held that a waiver executed after the statute had run was valid under the 1921 Act. (We print in an appendix, pp. 22–27, *infra,* so much of the opinion in this case, which is not yet reported, as bears upon the question here involved.)

In *Aiken* v. *Commissioner,* 35 F. (2d) 620, the Circuit Court of Appeals for the Eighth Circuit held that a waiver executed after the statute had run was valid under the 1921 Act. This case is

pending in this Court on a petition for certiorari, No. 777, October Term, 1929.

In all of the above cases, the Board of Tax Appeals held the waivers valid. 7 B. T. A. 800; 12 B. T. A. 1407; 13 B. T. A. 471; 13 B. T. A. 1425; 10 B. T. A. 553.

It also held that a waiver executed after the statute had run was valid under the 1924 Act in *Re California Iron Yards Co.*, 15 B. T. A. 25. This case was argued on the taxpayer's appeal in the Circuit Court of Appeals for the Ninth Circuit, but has not yet been decided.

II

THE WAIVER INVOLVED HEREIN, ALTHOUGH IN TERMS PROVIDING ONLY FOR THE ASSESSMENT OF THE TAX, IS APPLICABLE ALSO TO THE COLLECTION THEREOF

The consent filed by the taxpayer and accepted by the Commissioner of Internal Revenue in this case "waives any and all statutory limitations as to the time within which assessments based upon such liability [1914 tax] may be entered." (R. 16.)

Section 250 (d) of the Revenue Act of 1921, *supra*, under which the said consent was given, provides a five-year period of limitation upon the collection of the tax—

> * * * unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax.

While the statute under which the waiver was given provides for a consent to a later "determination, assessment, and collection" of the tax the written waiver executed by the taxpayer consented, in terms, only to a later "assessment" of the tax. Therefore, it is urged by the petitioner that the period of limitation for the "collection" of the tax was not waived and that even if the Commissioner of Internal Revenue had the power, under the waiver, to assess the additional tax determined to be due he did not have the power to collect it. It is argued, in substance, that the statute vested the Commissioner with the power to agree to perform three separate and distinct acts: (1) to determine the amount of the tax, (2) to assess the tax, and (3) to collect the tax; and that the authority of the Commissioner under a waiver is limited to the specific terms of the instrument.

We submit that the fallacy of this contention is patent. The statute authorizes the Commissioner of Internal Revenue to perform a single act—namely—to consent to the "determination, assessment, and collection" of a tax after the bar of the statute of limitations has intervened. It was not necessary to repeat in the waiver all of the words in the statute as the purpose and intent of the "consent" between the parties was clear. Had the waiver merely provided for a later "collection" of the tax, could it be contended with any force that it was invalid because the tax could be collected

only by assessment and as the waiver did not provide for such assessment, collection could not be enforced?

See *Chambers* v. *Cline,* 60 W. Va. 588, and cases cited therein.

As the court below said in the instant case (R. 32–33):

> The ordinary meaning of the word "assess," when used in connection with matters of taxation, is to fix the amount to be paid by the taxpayer. An assessment can only be made if the taxpayer is liable for the tax, and if liable for the payment of the tax it follows that it was collectible. In other words, a prerequisite of the right to assess is the right to collect the tax when assessed. It would seem, therefore, that an agreement for an assessment was based upon the understanding that the tax was collectible if assessed.
>
> * * * * *
>
> It should be said also that the words "assess" and "assessment," when used with reference to taxes, often include the collection thereof as a necessary sequence. In fact the term "assess" is used at times to include all the steps involved in imposing a tax on property (*Allen* v. *McKay,* 120 Cal. 332), and "to assess" often means to levy a tax (see cases cited under note 76, C. J. 813), the two words being used with practically the same meaning, Idem, 76 (b), and the words "to levy" always include the collection of a tax. The

same rule applies to the word "assessment," and the parties evidently intended that the word "assessment" should also cover the collection of the tax.

The word "assessment" as used in the waiver was a generic term and included all steps anticipatory of the collection of the tax. It must be presumed that the parties intended to perform a reasonable, logical act and that the waiver should accomplish a practical purpose. It would be unreasonable to assume that at the time when the waiver was filed by the taxpayer and accepted by the Commissioner of Internal Revenue it was the intention of the parties that the tax should be determined and assessed after the bar of the statute had become absolute, but that the taxes so found to be due should not be collected. The statutory period was the same for the collection of the tax as for its assessment. It had expired when the waiver in question was executed.

It would also be unreasonable to assume that the parties were actuated by idle curiosity in ascertaining the amount of taxes due or that they desired to have this data for statistical purposes. The only reasonable construction that can be accorded the waiver is that it consented to the determination, assessment, and collection of the tax after the statute of limitations had run, and the only logical motive that can be ascribed to the parties thereto is that they both contemplated and intended that it should have this effect.

If the petitioner executed the waiver with a secret purpose of evasion in mind, he should not be permitted to take advantage of his act, as the waiver was accepted by the Commissioner of Internal Revenue, and apparently he performed all of the acts required of him thereunder. It is not denied that he deliberately, intensively, and thoroughly considered the petitioner's tax liability before determining or assessing the taxes against him.

In the case of *Loewer Realty Co.* v. *Anderson, supra,* the Circuit Court of Appeals for the Second Circuit, in considering a question involving the validity of a waiver, said (p. 270):

> * * * the taxpayer should not in any event be allowed to repudiate a consent upon which the Commissioner has relied.

The petitioner in its brief (p. 25) endeavors to distinguish the waiver involved in the instant case from that considered by this Court in the case of *Florsheim Bros. Co.* v. *United States,* 280 U. S. 453, *supra,* by designating the instrument given in that case as a "statutory waiver." While no designation is given the waiver herein involved, it apparently is contended that it is either a contract or a common-law waiver. The distinction is made that the waiver in the *Florsheim case* contained all the terms of the statute, namely, "determination, assessment, and collection," whereas in the present case the waiver consented only to the later "assessment" of the tax.

This argument is ineffective when it is considered that all waivers given after the enactment of Section 250 (d) of the Revenue Act of 1921, *supra,* are "statutory waivers" and that the terms of the statute must be considered in connection with every waiver. Furthermore, this Court in the *Florsheim case* held that waivers are not contracts and that they "were nothing more than what they were termed on their face—waivers; * * *" (p. 466).

The petitioner has cited certain authorities which hold that a cause of action, which has been barred by the expiration of the statutory period of limitations, can not be revived by subsequent legislation, but those cases are plainly distinguishable from the one under consideration. As has been heretofore stated, there was no statute of limitations in force against the collection by suit of a tax for the year 1914 until Congress enacted the Revenue Act of 1921, *supra,* and in the same enactment granted authority to waive the limitation therein provided. That Act did not purport to revive any cause of action which was barred, but provided certain conditions under which the bar first created therein should not apply. The petitioner and the Commissioner of Internal Revenue complied with the conditions therein expressed.

There seems to be no decision on the precise point under discussion except that of the court below in the instant case. Petitioner's brief asserts that the Board of Tax Appeals "has con-

sistently adopted the view" for which he contends. As far as we know, the Board of Tax Appeals has not passed upon the point. The case of *Chicago Insulated Wire & Manufacturing Co.*, 10 B. T. A. 1195, the only case cited for this point on petitioner's brief, did not turn on this point. The decision was predicated upon the ground that the waiver expired April 1, 1924. It expired at this time because of an order of the Commissioner of Internal Revenue.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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APRIL, 1930.

APPENDIX

No. 5376

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

OPINION

(Decided February 21, 1930)

W. P. BROWN & SONS LUMBER COMPANY AND Brown Brothers Land & Lumber Company

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS REDETERMINING DEFICIENCIES IN TAXES FOR 1917 DUE FROM PETITIONERS

Before MOORMAN, MACK, and HICKS, Circuit Judges

MACK, Circuit Judge: * * *

On April 1, 1918, the other petitioner, W. P. Brown & Sons Lumber Company, filed its income and profits tax return for the year 1917; on December 13, 1920, it filed an unlimited waiver of "any and all statutory limitations as to the time within which assessments based upon such liability may be entered." On March 5, 1923, the Commissioner

made a jeopardy deficiency assessment for the taxable year 1917 and in the same month petitioner filed a claim for the abatement thereof. Thereafter petitioner filed a further waiver dated December 10, 1923, in which it consented "to a determination, assessment, and collection of the amount of income, excess profits, or war-profits taxes due under any return * * * for the year 1917 * * *." This waiver by its terms would have expired on December 10, 1924. On October 25, 1924, petitioner filed a similar waiver extending the period to "one year after the expiration of the statutory period of limitations within which assessment of taxes may be made for the year or years mentioned, or the statutory period of limitations as extended by Section 277 (b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau."

On October 28, 1925, respondent notified petitioner of a partial allowance of the claim in abatement and of the definite determination of the amount of the deficiency. On November 18, 1925, petitioner filed an appeal with the Board of Tax Appeals from this determination of deficiency. Subsequently the amount of the deficiency assessment, if any was to be paid, was stipulated by the parties; and the appeal was thereafter confined solely to the question of whether or not its collection was barred by the statute of limitations. From the decision of the Board finding that the collection was not so barred, petitioner has brought this appeal. * * *

* * * * *

Petitioner contends: (1) That the waiver of December 13, 1920, can not be relied upon because in

terms it extended solely the right to assess and not the right to collect; (2) that both the waivers of December 10, 1923, and October 25, 1924, are inapplicable because they relate only to taxes due "under any return" and the assessment sought to be collected was not a return by petitioner but an additional assessment made by the Commissioner in 1923; (3) that such waivers are also invalid because they were filed after the expiration of the statutory period for enforcing collection; (4) and, finally, that these waivers by their terms expired prior to the entry of the Board's order, and since, as petitioner maintains, Section 277 (b) of the Act of 1924 is inapplicable to the right of collection, and the statute had run prior to the enactment of the Act of 1926, collection is now barred.

Respondent contends: (1) that the waiver of December 10, 1923, although filed after the statute had run, is valid within Section 250 (d) of the Revenue Act of 1921; (2) that by virtue of this waiver and that of October 25, 1924, the period for determination, assessment, and collection of the petitioner's taxes for the year 1917 was extended to December 10, 1925; (3) that the extension of time granted by Section 277 (b) (2) and Section 278 (d) of the Revenue Act of 1924 is applicable; (4) and that since the Act of 1926 was passed while petitioner's appeal was pending, the period for collection was also thereby extended until the decision of the Board should have become final.

(1) It is conceded that unless the right of collection has been kept alive by waivers and by the provisions of the Revenue Acts of 1924 and 1926,

the collection of the unabated stipulated portion of the additional assessment for 1917 is now barred under Section 250 (d) of the Revenue Act of 1921.

(2) We need not consider whether or not the unlimited waiver of December 13, 1920, included collection, because in our judgment the waiver of December 10, 1923, though given after the statute had run, was effective to revive the Government's right to assess and collect the taxes for 1917. Petitioner's argument that it was not, proceeds upon the double theory that Section 250 (d) of the Act of 1921 necessarily requires that the waiver be signed before the statute has run, and that if the specified period has elapsed, the right as well as the remedy is extinguished. We find nothing in the text or content of Section 250 (d) to require this construction. Statutes imposing limitations upon action by the United States are to be strictly construed in favor of the Government. *United States* v. *Whited & Wheless, Ltd.*, 246 U. S. 552; *Dupont de NeMours & Co.* v. *Davis*, 264 U. S. 456. It is true that the section requires that the Commissioner also sign the waiver (*Greylock Mills* v. *Commissioner*, 31 F. (2d) 655 (C. C. A. 2d)); and the Court of Appeals of the District of Columbia seems to be of the opinion that this precludes a waiver after the five years has run, on the theory that the Commissioner's consent would be but a futile gesture after his authority to collect the tax has ended. See *Joy Floral Co.* v. *Commissioner*, 29 F. (2d) 865.

The legislative purpose in requiring such consent is not apparent; if a contract is contemplated, it is difficult to see what consideration the Commis-

sioner furnishes. See *Greylock Mills* v. *Commissioner,* 31 F. (2d) 655, 657. Another reason, however, may be suggested. Oral waivers would have been subject to dispute and controversy as to form and meaning, and Congress made it clear that the taxpayer should not be bound except by a written waiver acceptable to the Commissioner. When a waiver is accepted, it is understood, if not impliedly agreed, that proceedings for the collection of the tax will be suspended until intensive and thorough consideration of the taxpayer's claimed exemptions, valuations, and the like will have been made. This would frequently result in a delay of the assessment and collection until after the statutory period had run, and as an incident of orderly administrative procedure it was essential that the Commissioner have full knowledge of the action taken and, therefore, that such a waiver be not accepted indiscriminately by a Collector or revenue agent. This may well account for the statutory requirement that to be effective, the waiver be signed by the Commissioner. The time of his signature, however, was not vital; as recently stated by the Court of Claims, after a thorough examination of the contention that a prior signature was necessary, "to hold that the statute requires the Commissioner to consent to the waiver before the expiration of the period of limitations is to engraft upon the statute something which certainly is not contained within its provisions nor, as we think, is there any reason to infer that such was the intent of Congress." *Stange* v. *United States,* Ct. Clms., November 4, 1929, United States Daily, November 8, 1929, pp. 2262–63. See also *Wells Bros. Co.* v.

Commissioner, 16 B. T. A. 79; *Harris Co.* v. *Commissioner,* 16 B. T. A. 469.

The contention that the right as well as the remedy was barred and that consequently there was no consideration for petitioner's waiver can not be accepted. This problem has recently arisen in connection with the asserted unconstitutionality of Sections 607 and 611 of the Revenue Act of 1928 (45 Stat. 874–75, 26 U. S. C. A. 2607, 2611) by which Congress in certain cases removed the bar of the statute after it had once fallen. It has been held in a number of cases that the bar imposed by Section 250 (d) of the Act of 1918 (40 Stat. 1083) and similar provisions in other acts goes merely to the remedy and not to the right, and that the legislature which imposed the bar may remove it. *Huntley* v. *Gile,* 32 F. (2d) 857 (C. C. A. 9th); *Wright & Taylor Co.* v. *Lucas,* W. D. Ky., decided July 26, 1929; *Regla Coal Co.* v. *Bowers,* S. D. N. Y., decided by the writer, November 13, 1929. In any event, the bar of the remedy, provided by the ordinary statute of limitations, may be effectively waived without consideration. See Williston, Contract, Sections 160–84.

* * * * *

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No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1930

CHARLES H. STANGE, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

REVISED

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OPINION BELOW

The opinion of the Court of Claims (R. 26–35) is reported in 68 C. Cls. 395.

JURISDICTION

The judgment of the Court of Claims was entered November 4, 1929. (R. 35.) Petition for writ of certiorari was filed January 3, 1930, and the writ was granted March 3, 1930. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a written consent, executed by the taxpayer and the Commissioner of Internal Reve-

nue, under the provisions of Section 250 (d) of the Revenue Act of 1921, extending indefinitely the period of limitations upon the assessment of income taxes for the year 1914, is valid when given after the expiration of the period of limitations provided in that section.

2. Whether the written consent, which, by its terms, agrees only to a later "assessment" of the taxes, also applies to the collection thereof.

STATUTES INVOLVED

The Revenue Act of 1921, c. 136, 42 Stat. 227, 265, so far as material, provides:

> SEC. 250. * * * (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding

> for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *.

STATEMENT

On February 19, 1915, the petitioner filed his Federal income-tax return for the calendar year 1914, reporting a taxable income of $824.08 and a tax thereon of $8.24, which was paid. (R. 17.)

On or about November 14, 1922, the petitioner executed and filed with the Bureau of Internal Revenue a written instrument, which, on or about March 16, 1923, was approved and signed by the Commissioner of Internal Revenue. The instrument is in the following form (R. 25):

> C. H. Stange, of Merrill, Wisconsin, in consideration of the assurance given him by officials of the Income Tax Unit of the Bureau of Internal Revenue that his liability for all Federal taxes imposed by the Act of Congress approved October 3, 1913, and also by the act of Congress approved September 8, 1916, as amended by the act of Congress approved October 3, 1917, on his net income received from all sources in the year ended December 31, 1914, and in the year ended December 31, 1917, respectively, shall not be

determined except after deliberate, intensive, and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that the above-named individual does not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against him for the said years by the officials of the Income Tax Unit.

[STAMP:] (S) C. H. STANGE.

Approved March 16, 1923.

D. H. BLAIR,

Commissioner of Internal Revenue.

MERRILL, WISCONSIN, *November 10, 1922.*

The Commissioner of Internal Revenue determined that the petitioner's taxable income for the year 1914 was $642,138.40 in addition to that reported, and in February, 1924, assessed thereon an additional tax of $28,992.55, which was paid on March 19, 1925, together with interest in the sum of $1,787.21, or a total of $30,779.76. (R. 25–26.)

On June 8, 1927, the petitioner filed a claim for the refund of this $30,779.76 on the ground that the collection thereof was barred by the statute of limitations at the time of payment. (R. 26.) No action was taken on this claim (R. 26), and petitioner brought suit against the United States in the Court of Claims, which entered a judgment dismissing his petition (R. 35–36).

SUMMARY OF ARGUMENT

I. The general rule that a beneficiary under a statute of limitations may waive the benefit after the bar of the statute has intervened is applicable to this case. A statute of limitations, as a general rule, operates on the remedy, but does not extinguish the liability. The plea of the statute of limitations is a personal privilege which may be waived. In imposing the limitations of Section 250 (d) of the Revenue Act of 1921 upon the Government's right to determine, assess, and collect taxes, Congress clearly intended to sanction the application of common-law principles of waiver. Although there is a conflict of opinion in the Federal courts upon the precise point, we submit that the better reasoning supports our contention that a waiver executed after the expiration of the statutory period is valid and operative under the statute.

II. The fact that the consent did not expressly refer to the collection of the tax is immaterial. It was executed under authority of Section 250 (d) of the Revenue Act of 1921, which authorized consents for determination, assessment, *and* collection. This section must be considered in connection with the written consent. The intent of the parties to the instrument is clear. It would be unreasonable to assume that they entered into an agreement with the thought that it would authorize the assessment of a tax, but would not allow its collection.

ARGUMENT

The order of this Court granting the issuance of a writ of certiorari to review the determination of the Court of Claims in this case contained the following limitation upon the scope of the issues to be presented:

> * * * counsel shall confine themselves, in the briefs and in oral argument, to the questions involving the validity and effect of the waiver of the statute of limitations executed in this cause.

I

THE WAIVER SIGNED BY THE TAXPAYER AND THE COMMISSIONER ON NOVEMBER 10, 1922, AFTER THE EXPIRATION OF THE PERIOD OF LIMITATION IMPOSED BY SECTION 250 (d) OF THE REVENUE ACT OF 1921, WAS EXPRESSLY AUTHORIZED BY THAT SECTION AND EFFECTIVELY WAIVED THE LIMITATION

Prior to the enactment of the Revenue Act of 1921, there was no statute of limitations in effect barring the collection, by suit, of taxes for the year 1914. *Bowers* v. *New York & Albany Co.*, 273 U. S. 346, 350. The limitations provided in the Revenue Act of 1918 were not in terms retroactive and therefore applied only to taxes assessed under that Act (c. 18, Sec. 250 (d), 40 Stat. 1057, 1083).

In providing a five-year period of limitation upon the collection of taxes, the Revenue Act of 1921, in Section 250 (d), pp. 2–3, *supra,* specified that that period of limitation should apply to all prior Revenue Acts including the Act of August

5, 1909. In the same sentence of the section imposing this limitation, the following qualification of the limitation is prescribed:

> unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax.

Although this qualification is expressly attached only to the provisions relative to assessment, it obviously applies also to collection.

This was the first time that Congress by statute referred to the waiving of any statute of limitations applicable to the collection of taxes. The statute which in terms applies to returns filed more than five years before its enactment barred the assessment of taxes under such returns unless the requisite consent should thereafter be given. That in this respect the law was prospective in effect can not reasonably be doubted, because there was no such prior limitation, and therefore no occasion for such consent before its enactment. The suggestion in petitioner's brief (p. 23) that the right to collect taxes for 1914 might have continued beyond the time of the enactment of the Revenue Act of 1921 because of the past giving of waivers of the time for bringing suit is fanciful. Since until that enactment there was no limitation on the time for bringing suits for collection, there was no occasion for any such waivers. The further suggested possibility that waivers might have been given in cases of failure to file returns seems so remote that it can hardly be assumed that Congress inserted the provision in question merely to take care of such a

situation. Consequently consents given after its enactment avoid the bar in cases more than five years old when the Act was passed, and it follows that the very language of the statute contemplates an effective consent given after the period of limitation has expired. Any other interpretation deprives the qualifying words of any practical sense or meaning in their application to tax returns filed more than five years before the Act of 1921 was passed, and this in the face of its declared intention that the limitation, with its qualification dependent upon consent, shall apply in such cases. The case at bar is such a case.

In support of the contention that Section 250 (d) of the Revenue Act of 1921, *supra,* authorized the taxpayer and the Commissioner of Internal Revenue to consent, after the enactment of that provision, to the determination, assessment, and collection of any tax due under the Revenue Act of 1921 or any prior Revenue Act, the grammatical construction of the section is important. The word "consent" unquestionably denotes present or future action and not past action; and in the absence of words requiring "consent" before the period of limitation expires, it should be thus interpreted.

The position of the Government in this case is not unfair. It is the general rule that a beneficiary under a statute of limitations may waive the benefit after the bar of the statute has intervened. A statute of limitations operates on the remedy but ordinarily it does not extinguish the

right, and a claim which is barred, while it ceases to be a legal obligation, remains a moral one. The debt is not necessarily obliterated although the remedy to enforce collection is barred. *Campbell* v. *Holt,* 115 U. S. 620; *Sanger* v. *Nightingale,* 122 U. S. 176. A tax obligation is a debt. *Keen* v. *Sheehan,* 154 Mass. 208. See also *Price* v. *United States,* 269 U. S. 492. The statute of limitations is a statute of repose designed not merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of things may have been forgotten. *Gillingham* v. *Brown,* 178 Mass. 417.

The plea of the statute of limitations has been held to be a personal privilege of which a party may avail himself or not as he chooses. *Sanger* v. *Nightingale, supra.* In the case of *Bank* v. *Kimble,* 76 Ind. 195, the Supreme Court of the State of Indiana said (p. 203):

> The mere fact that a claim is old is no reason why it should not be paid. The law allows a man to be honest and to pay an honest debt, however stale and ancient it may be. He may interpose the statute of limitations, but he may waive it also.

If one individual who is indebted to another may waive the bar of the statute of limitations after it has intervened, certainly the same rule may fairly be applied to a citizen indebted to his sovereign. It would be a strange anomaly of law if in minor affairs of business the bar of the statute could be

waived for the benefit of individual creditors but could not be waived by a citizen for the benefit of the Government. In the absence of statutory authority a taxpayer may waive the statute of limitations and pay the tax. Yet it is urged in the case at bar that the specific authority granted by Congress to taxpayers to waive limitation curtailed or restricted existing rights instead of defining or regulating those already possessed. We submit that in imposing the limitations of Section 250 (d) of the Revenue Act of 1921 upon the Government's right to determine, assess, and collect taxes, Congress clearly intended to sanction the application of common-law principles of waiver. This was the obvious purpose of the qualifying clause, which must be read in qualification of any expression in the section which might be thought mandatory and therefore to exclude the possibility of waiver.

As the Court of Claims said in the instant case (R. 34–35):

> In the absence of a statutory provision either before or after the running of the statute of limitations, the taxpayer could by a mere oral statement waive the running of the statute. Even after the running of the statute, the moral obligation to pay any taxes that were properly levied would be a sufficient consideration for the waiver. * * * To hold that the statute requires the commissioner to consent to the waiver before the expiration of the period of limitation is to engraft upon the statute some-

> thing which certainly is not contained within its provisions nor, as we think, is there any reason to infer that such was the intent of Congress.

In *Perkins* v. *Dyer,* 71 Md. 421, the Court of Appeals of Maryland, in considering an issue identical in principle with that here presented, said (p. 423):

> Now prior to the Act of 1852, chap. 75, and the Act of 1874, chap. 483, there was not, as we all know, any statute of limitations applicable to the collection of taxes, and the object of these Acts was to prescribe a time within which county and city taxes should be collected, and, unless collected within that time to allow the party from whom they are demanded, the *privilege* of *pleading the provisions of* the *Act in bar* of *their recovery.* These Acts are nothing more or less, than statutes of limitation applicable to the collection of county and city taxes, and founded on the same reasons and policy as all other statutes of limitations are founded, and must be construed in accordance with the settled rules which govern the construction of such statutes. This being so, a promise on the part of the tax-payer to pay such taxes, made after the expiration of the time prescribed, must be held to take them out of the operation of the statute.

That such consents do not require a supporting consideration is clear. In *Loewer Realty Co.* v. *Anderson* (C. C. A. 2d), 31 F. (2d) 268, the court said (p. 270):

> It is objected that the waiver was without consideration, *but the statute requires nothing but a consent,* without mentioning consideration, * * *. (Italics ours.)

See also *Florsheim Bros. Co.* v. *United States,* 280 U. S. 453, 466.

On the precise question under consideration there has been a conflict of opinion in the Federal courts.

The petitioner relies upon the case of *Joy Floral Co.* v. *Commissioner* (Ct. App. D. C.), 29 F. (2d) 865. Undoubtedly there are expressions in the opinion of the court which support his contention, but the facts in that case are clearly distinguishable from the present case. That case involved Section 278 (c) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 300; and the court construed the words in that statute "*have consented* in writing to the assessment" to relate only to an agreement made prior to the expiration of the five-year period. The court's opinion stated (p. 867) that the taxpayer was led into the belief that the limitation had not expired by the erroneous statement in a letter from the Deputy Commissioner that the statute had not then but would presently expire. The court held, therefore, that the taxpayer did not intend to waive the rights which had accrued to it, and that the execution of the consent had been procured by the erroneous statement by the Deputy Commissioner. This appears to be the more substantial basis for the court's decision in that case. In the instant

case the element of misrepresentation is not present.

The *Joy Floral case* was followed in *Pictorial Printing Company* v. *Commissioner* (C. C. A. 7th), 38 F. (2d) 563. In the latter case, the court emphasized the fact that the revenue agent had threatened immediate assessment and collection, although the right to collect had already expired. The court held that the threat partook of the nature of duress, and undoubtedly attached weight to it in reaching its conclusion. The threat was tantamount to deceit and misrepresentation, and the court held the waiver invalid. With little discussion it also apparently applied the reasoning of the court in the *Joy Floral case* to the provisions of Section 250 (d) of the Act of 1921.

In *Chicago Railway Equipment Company* v. *Commissioner,* 39 F. (2d) 378, the Circuit Court of Appeals for the Seventh Circuit without discussion held that a waiver executed after the statute had run was invalid. As it was executed on December 10, 1925, the provision of the 1924 Act, rather than that of the 1921 Act, must have been involved; but there is no indication that the court would construe the two provisions differently. The case involved no element of misrepresentation or duress. This case is now pending before this Court on a writ of certiorari, No. 231, October Term, 1930.

In *W. P. Brown & Sons Lumber Company* v. *Commissioner,* 38 F. (2d) 425, the Circuit Court of Appeals for the Sixth Circuit, in a well-considered

opinion, held that a waiver executed after the statute had run was valid under the 1921 Act. This case is now pending before this Court on a writ of certiorari, No. 115, October Term, 1930.

In *Aiken* v. *Commissioner,* 35 F. (2d) 620, the Circuit Court of Appeals for the Eighth Circuit held that a waiver executed after the statute had run was valid under the 1921 Act. This case is pending in this Court on a writ of certiorari, No. 69, October Term, 1930.

In all of the above cases, the Board of Tax Appeals held the waivers valid. 7 B. T. A. 800; 12 B. T. A. 1407; 13 B. T. A. 471; 13 B. T. A. 1425; 10 B. T. A. 553.

In *Sabin* v. *United States,* decided on October 20, 1930, the Court of Claims followed its decision in the instant case and held a waiver of assessment of 1915 taxes valid, although executed after the expiration of the five-year period for assessment.

There are pending before this Court on petitions for certiorari two other cases which may raise questions as to the effect of waivers. *Mascot Oil Company, Inc.,* v. *United States,* No. 400; and *Roy & Titcomb, Inc.,* v. *United States,* No. 412.

II

THE WAIVER INVOLVED HEREIN, ALTHOUGH IN TERMS PROVIDING ONLY FOR THE ASSESSMENT OF THE TAX, IS APPLICABLE ALSO TO THE COLLECTION THEREOF

The consent filed by the taxpayer and accepted by the Commissioner of Internal Revenue in this

case "waives any and all statutory limitations as to the time within which assessments based upon such liability [1914 tax] may be entered." (R. 16.)

Section 250 (d) of the Revenue Act of 1921, pp. 2–3, *supra,* under which the said consent was given, provides a five-year period of limitation upon the collection of the tax—

> * * * unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax.

While the statute under which the waiver was given provides for a consent to a later "determination, assessment, and collection" of the tax, the written waiver executed by the taxpayer consented, in terms, only to a later "assessment" of the tax. Therefore, it is urged by the petitioner that the period of limitation for the "collection" of the tax was not waived and that even if the Commissioner of Internal Revenue had the power, under the waiver, to assess the additional tax determined to be due he did not have the power to collect it. It is argued, in substance, that the statute vested the Commissioner with the power to agree to perform three separate and distinct acts: (1) to determine the amount of the tax, (2) to assess the tax, and (3) to collect the tax; and that the authority of the Commissioner under a waiver is limited to the specific terms of the instrument.

We submit that the fallacy of this contention is patent. The statute authorizes the Commissioner

of Internal Revenue to perform a single act, namely, to consent to the "determination, assessment, and collection" of a tax after the bar of the statute of limitations has intervened. It was not necessary to repeat in the waiver all of the words in the statute, as the purpose and intent of the "consent" between the parties was clear. Had the waiver merely provided for a later "collection" of the tax, could it be contended with any force that it was invalid because the tax could be collected only after assessment and as the waiver did not provide for such assessment, collection could not be enforced?

See *Chambers* v. *Cline,* 60 W. Va. 588, and cases cited therein.

As the court below said in the instant case (R. 32–33):

> The ordinary meaning of the word "assess," when used in connection with matters of taxation, is to fix the amount to be paid by the taxpayer. An assessment can only be made if the taxpayer is liable for the tax, and if liable for the payment of the tax it follows that it was collectible. In other words, a prerequisite of the right to assess is the right to collect the tax when assessed. It would seem, therefore, that an agreement for an assessment was based upon the understanding that the tax was collectible if assessed.
>
> * * * * *
>
> It should be said also that the words "assess" and "assessment," when used with

> reference to taxes, often include the collection thereof as a necessary sequence. In fact the term "assess" is used at times to include all the steps involved in imposing a tax on property (*Allen* v. *McKay*, 120 Cal. 332), and "to assess" often means to levy a tax (see cases cited under note 76, 5 C. J. 813), the two words being used with practically the same meaning, Idem, 76 (b), and the words "to levy" always include the collection of a tax. The same rule applies to the word "assessment," and the parties evidently intended that the word "assessment" should also cover the collection of the tax.

In *Sabin* v. *United States,* decided on October 20, 1930, the Court of Claims followed its decision in the instant case and held that a waiver of "assessment" also applied to collection.

The word "assessment" as used in the waiver was a generic term and comprised all steps anticipatory of and including the collection of the tax. It must be presumed that the parties intended to perform a reasonable and logical act and that the waiver should accomplish a practical purpose. It would be unreasonable to assume that at the time when the waiver was filed by the taxpayer and accepted by the Commissioner of Internal Revenue it was the intention of the parties that the tax should be determined and assessed after the bar of the statute had become absolute, but that the taxes so found to be due should not be collected. The statutory period was the same for the collection of

the tax as for its assessment. It had expired when the waiver in question was executed.

It would also be unreasonable to assume that the parties were actuated by idle curiosity to ascertain the amount of taxes due or that they desired to have this data for statistical purposes. The only reasonable construction that can be accorded the waiver is that it consented to the determination, assessment, and collection of the tax after the statute of limitations had run, and the only intelligent and logical motive that can be ascribed to the parties thereto is that they both contemplated and intended that it should have this effect.

The waiver was accepted by the Commissioner of Internal Revenue, and apparently he performed all of the acts required of him thereunder. It is not denied that he deliberately, intensively, and thoroughly considered the petitioner's tax liability before determining or assessing the taxes against him.

In the case of *Loewer Realty Co.* v. *Anderson, supra,* the Circuit Court of Appeals for the Second Circuit, in considering a question involving the validity of a waiver, said (p. 270):

> * * * the taxpayer should not in any event be allowed to repudiate a consent upon which the Commissioner has relied.

In *Crowell Elevator Company* v. *A. B. Allison, Collector,* the United States District Court for the District of Nebraska, on August 18, 1930, held that a waiver providing only for the later assessment of

the tax was applicable also to the collection thereof. (This case has not as yet been officially reported, but the text of the court's opinion appears in Prentice-Hall Tax Service (1930) at pages 1857–1858, paragraph 1570.)

The United States District Court for the Western District of Pennsylvania, on June 28, 1930, held to the same effect in *Max Solomon* v. *Heiner, Collector.* (Opinion appears in Prentice-Hall Tax Service (1930), pp. 1617–1618, paragraph 1301.) This decision followed the decision by the same court on June 16, 1930, in the case of *Washington Coal and Coke Company* v. *Heiner,* 42 F. (2d) 681, wherein the question was fully considered.

The petitioner has cited certain authorities which held that a cause of action which has been barred by the expiration of the statutory period of limitations can not be revived by subsequent legislation, but those cases are plainly distinguishable from the one under consideration. As has been heretofore stated, there was no statute of limitations in force against the collection by suit of a tax for the year 1914 until Congress enacted the Revenue Act of 1921, *supra,* and in the same enactment it granted authority to waive the limitation therein provided. That Act did not purport to revive any cause of action which was barred, but provided certain conditions under which the bar first created therein should not apply. The petitioner and the Commissioner of Internal Revenue complied with the conditions therein expressed.

Petitioner's brief asserts that the Board of Tax Appeals "has consistently adopted the view" for which he contends. The case of *Chicago Insulated Wire & Manufacturing Co.,* 10 B. T. A. 1195, the only case cited for this point on petitioner's brief, did not turn on this point. The decision was predicated upon the ground that the waiver expired April 1, 1924, because of an order of the Commissioner of Internal Revenue.

The Board has decided the issue in accordance with the Government's contention in the following cases: *Watt & Holmes Hardware Co.* v. *Commissioner,* 8 B. T. A. 372; *Lutcher & Moore Cypress Lumber Co.* v. *Commissioner,* 19 B. T. A. 887.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1930.

No. 23.

CHARLES H. STANGE,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE.

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IN THE

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CHARLES H. STANGE,

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v.

THE UNITED STATES OF AMERICA,

Respondent.

ON CERTIORARI TO THE COURT OF CLAIMS.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Comes now the undersigned and respectfully moves for leave to file the annexed brief for the Holmes Manufacturing Company, as a friend of the Court.

Counsel for both parties have consented to the filing of this brief.

The undersigned is counsel for the Holmes Manufacturing Company in its suit against the United States now pending in the United States District Court for the District of Massachusetts (Law Docket No. 4110 therein), which presents the same question presented in this case and in order that the Holmes Manufacturing Company may be heard in the determination of its rights in said suit, it is desired to file this brief.

JOHN E. HUGHES.

IN THE

Supreme Court of the United States

October Term, 1930.

No. 23.

CHARLES H. STANGE,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON CERTIORARI TO THE COURT OF CLAIMS.

BRIEF OF AMICUS CURIAE ON BEHALF OF THE HOLMES MANUFACTURING COMPANY.

Preliminary Statement.

May It Please the Court:

The decision of this case will be determinative of the same question presented in the District Court in Massachusetts in the case of the Holmes Manufacturing Company, for which the undersigned is counsel and the Court's permission to file this brief is greatly appreciated.

In the briefs of the parties there has appeared a statement of the grounds upon which the jurisdiction of this Court is invoked, the question presented, the statute involved and the facts of the case which need not be repeated here.

SUMMARY OF ARGUMENT.

I.

When the *Revenue Act of 1928* was being enacted in Congress the Treasury Department was cognizant of the question presented in pending cases concerning whether waivers executed after the statutory period of limitation had expired were valid and made an attempt to have Congress ratify such waivers. This Congress refused to do.

With reference to waivers executed after its enactment, the express provisions of the *Revenue Act of 1928* render them invalid except to a limited extent.

Waivers executed after the statute of limitations has expired and after the enactment of the *Revenue Act of 1926* are rendered invalid by the express provisions of that Act if collection of the tax was barred at the date of the enactment of that Act.

Waivers executed after the enactment of the *Revenue Act of 1924* and after the statute of limitations has run are rendered invalid by the express provisions of that Act, if the collection of the tax was barred at the date of the enactment of that Act.

The *Revenue Acts of 1926 and 1924*, and the *Revenue Act of 1921* are in *pari materia* and should be considered together in determining the intention of Congress.

Those decisions which sustain the validity of waivers executed after the enactment of the *Revenue Act of 1924* are based partly on the erroneous assumption that statutes of limitation are to be construed strictly in favor

AMICUS CURIAE BRIEF

of the Government (In *United States v. Updike, 281 U. S. 489, at page 496,* this Court stated the rule to be otherwise), and partly on the erroneous assumption that such statutes contained in the revenue acts merely bar the remedy and do not extinguish the liability.

The rule stated by this Court is that statutes of limitation contained in the taxing acts should be construed liberally in favor of taxpayers. The statutes of limitation contained in the revenue acts were intended by Congress not only to bar the remedy but to extinguish the liability, and facts usually inherent in such a situation as that presented in the case at bar are contributory reasons for deciding the question in favor of the taxpayer.

Finally, it will be submitted that regardless of what may be the conclusion as to the validity of the waiver, it did not authorize the collection of the tax in the present case because it waived assessment only and it should not be extended beyond its plain terms.

The Situation Under the Revenue Act of 1928 with Respect to Waivers Executed After the Statute of Limitations Has Run.

Waivers executed after the enactment of the *Revenue Act of 1928* and after the statute of limitations has run are not valid except when collection was not barred at the time of the enactment of the *Revenue Act of 1926* and when executed between May 29, 1928 and January 1, 1929.

When the *Revenue Act of 1928* was pending in Congress the Treasury Department made an effort to have Congress ratify waivers executed after the statute of limitations had run. This Congress refused to do.

In *Section 506 of the Revenue Act of 1928* which bears the heading: "WAIVERS AFTER EXPIRATION OF PERIOD OF LIMITATION", Congress made certain provisions for such waivers.

Section 506 (c) of the Revenue Act of 1928 provides as follows:

> "The amendments made by this Section to the *Revenue Act of 1926* shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act which shall be determined according to the law in existence at the time such waiver was filed."

Further in *Section 506 of the Revenue Act of 1928*, Congress provided that *Section 278 of the Revenue Act of 1926* is amended as follows:

> "(f). Any agreement which would be within the provisions of *Subdivision (c) or (d)* of this Section but for the fact that it was executed after the expiration of the period of limitation extended by such agreement, shall be valid and effective according to its terms if entered into after the enactment of the *Revenue Act of 1928* and before January 1, 1929."

Notwithstanding the great effort made by the Treasury Department to induce Congress to validate waivers executed after the statute of limitations had run, the greatest length to which it would go was to validate such waivers only in the event that they were executed between May 29, 1928 and January 1, 1929.

In *Section 506 (a) of the Revenue Act of 1928* it is provided that *Section 278 of the Revenue Act of 1926* is amended as follows:

> "Where *before the expiration of the time prescribed in Section 277* for the assessment of the tax, both the Commissioner and the taxpayer have con-

> sented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made *before the expiration of the period* previously agreed upon." (Italics ours.)

From the above it appears entirely clear that if a waiver was executed after the statute of limitations had run and while the *Revenue Act of 1928* was in force, Congress intended it to be invalid unless it was executed between May 29, 1928 and January 1, 1929.

Under the Revenue Act of 1926.

By the provisions of the *Revenue Act of 1926* waivers executed after the enactment of the *Revenue Act of 1926* and after the statute of limitations has run are invalid if the statute had run when that Act was enacted.

On page 20 of its brief, filed in this case, respondent states that:

> "All waivers given after the enactment of *Section 250 (d) of the Revenue Act of 1921 supra* are 'statutory waivers' and that the terms of the statute must be considered in connection with every waiver."

All waivers must comply with the provisions of the statute and if they do not they are not statutory waivers.

In *Jacobs Bros. Co., 19 B. T. A. 315*, the Board of Tax Appeals held that the statutory provisions of the *Revenue Act of 1926* rendered invalid a waiver executed after its enactment and after the statute of limitations had expired where collection was barred when the 1926 Act was enacted. The reasoning of the Board of Tax Appeals is as follows:

"On this point we think that *Section 278 (e)* is controlling. That section provides as follows:

"(e). This section shall not bar a distraint or proceeding in court begun before the enactment of the *Revenue Act of 1924;* nor shall it authorize the assessment of a tax or the collection thereof by distraint or proceeding ~~was barred by the statutory per~~ of the enactment of this Act such assessment, distrain or proceeding was barred by the statutory period of limitation properly applicable thereto, *unless prior to the enactment of this Act* the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of *subdivision (a) of Section 274* of this Act. (Italics ours.)

"At the time of the enactment of the *Revenue Act of 1926* the collection of the tax was already barred by the statutory period of limitation properly applicable thereto and the Commissioner and the taxpayer did not agree in writing prior to the enactment of the *Revenue Act of 1926* to any extension of time for the collection of the tax after the expiration of the statutory period. *Subdivision (e) of Section 278* is a limitation upon all the other provisions of *Section 278 of the Revenue Act of 1926,* and under that subdivision any consent or agreement by the Commissioner and the taxpayer with respect to the assessment or collection of the tax must be made prior to the enactment of that Act in order to have effect, provided at the time of the enactment of the Act the assessment or collection was barred. This being true, it is not necessary for us to discuss the effect of the repeal of *Section 1106 of the Revenue Act of 1926* by the *Revenue Act of 1928,* nor is it necessary for us to discuss the applicability of our decision in the *Joy Floral Co. case.*

"In view of the foregoing, it is our opinion that the collection of the deficiency is barred by the statute of limitations."

The reasoning of the above opinion of the Board of Tax Appeals seems logically unassailable. *Section 278 of the Revenue Act of 1926* contained the statutory provisions for waivers and, as said by the Board, that section provided that if the tax was barred when it was enacted, a waiver should not be valid unless the same was executed prior to the enactment of the *Revenue Act of 1926*.

By the Provisions of the Revenue Act of 1924 Waivers Given After Its Enactment Are Invalid If Collection Was Barred at the Date of Its Enactment.

Section 278 of the Revenue Act of 1924 is the section which contains the statutory authority for waivers. *Subdivision (e)* of that section provides:

> "This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence."

The reasoning of the Board of Tax Appeals with respect to a similar provision in the *Revenue Act of 1926* would seem to be applicable here and compare your Honors' construction of a part of this section in *Russell v. United States, 278 U. S. 181.*

Waivers Executed After the Statute of Limitations Has Run and Prior to the Enactment of the Revenue Act of 1924.

The argument for the validity of waivers executed after the statute of limitations has run and prior to the enactment of the *Revenue Act of 1924* is (1) there is no statutory provision expressly prohibiting such waivers and *Section 250 (d) of the Revenue Act of 1921* should

be construed to authorize them, and (2) the statutes of limitation contained in the Revenue Acts merely bar the remedy and do not extinguish the liability.

It will be conceded that taxes do not depend upon contract but upon statute. A citizen cannot contract with a government official, except under clear and unambiguous statutory authority, to pay a specified amount of taxes. Unless the taxing power of the Nation has imposed the tax by statute in a constitutional manner the citizen is not liable and if that taxing power has extinguished the citizen's liability for a tax he cannot recreate that liability by contract except in a manner clearly provided by statute and in conformity to the Constitution. Congress did not expressly provide by statute for waivers after the statute of limitations had run except in the manner before mentioned in the *Revenue Act of 1928* wherein it validated waivers executed between the date of the enactment of that Act, viz: May 29, 1928, and January 1, 1929. It refused to validate such waivers given prior thereto.

It is contended by the respondent that when Congress provided in *Section 250 (d) of the Revenue Act of 1921* that the statute of limitations should be five years after the return was filed "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax", it intended that this consent might be entered into after the statute of limitations has run.

Much reliance is placed by the respondent on the case of *W. P. Brown & Sons Lumber Company*, which decision appears in the appendix to respondent's brief and which is now pending herein on certiorari.

In that case the Court advanced as a reason for its construction of *Section 250 (d)* in favor of the Government that "statutes imposing limitations upon action by the United States are to be strictly construed in favor of the Government". In this the Court was in error.

In *United States v. Updike, 281 U. S. 489*, this Court at page *496* restated the contrary rule, saying:

> "In any event, we think this is the fair interpretation of the clause, and the one which must be accepted especially in view of the rule which requires taxing acts, *including provisions of limitation imposed therein*, to be construed liberally in favor of taxpayers. *Bowers v. New York & Albany Co., 273 U. S. 346, 349.*" (Italics ours.)

It is submitted that the rule requiring a liberal construction of all of the provisions of a taxing act in favor of the taxpayer is founded upon the public policy which underlies our Government and which is manifested in the provisions of our Constitutions for the protection of private property. Our theory of Government is that individual initiative should be encouraged and that private property should be protected, and under that theory we have attained the enjoyment of a material prosperity hitherto unknown in the history of mankind. It is well known that there is a tendency to "pork-barrel" public money and these considerations compose the main arguments against Government ownership and socialism. It is probable that these considerations of public policy underly the rule that tax laws are to be construed liberally in the favor of taxpayers and that private property is not to be taken for public use unless the law clearly and without ambiguity takes it.

It is further submitted that fairness and the facts usually inherent in such a situation as that presented in the case at bar require a construction in favor of the taxpayer.

Usually the citizen who deals with his Government has a great respect for it and is prone to comply immediately with requests of its agents. When its agents ask for waivers after the statute of limitations had run, they were usually executed. In many cases the taxpayers, who executed these waivers, did not know that the statute of limitations had run.

In the articles on waivers in *27 R. C. L., at page 909* it is said:

> "No man can be bound by a waiver of his rights unless such waiver is intentionally made with full knowledge of the rights which he intends to waive and the fact that he knows his rights and intends to waive them, must plainly appear."

While it does not appear in the case at bar that the taxpayer knew the statute of limitations had run when he executed the waiver, and while it may be urged that he was bound to know the law, nevertheless the fairness underlying the above rule of law is obvious and for all practical purposes, so far as the taxpayer is concerned, it is immaterial to him whether he was ignorant of a state of facts or a rule of law.

The statute of limitations never ran in the case of a fraudulent return and if the agents of the Commissioner saw fit to make a charge of fraud against a taxpayer they could make great trouble for him. Even if taxpayers did know that the statute of limitations had run, nevertheless

when a Revenue Agent demanded a waiver they sometimes feared a charge of fraud if they did not comply with the request and the imposition of a fraud penalty upon them or possibly indictment. In some cases revenue agents even threatened to impose a fraud penalty and to make a charge of fraud unless waivers were executed. (See the case of *Diescher v. Commissioner, 18 B. T. A. 353.)*

Until the decision of this Court in *Bowers v. New York & Albany Lighterage Company, 273 U. S. 346*, the Treasury Department believed that if it assessed a tax in time it could be collected at any time by distraint. That case was decided by this Court on February 21, 1927. It is true that the Treasury Department had persisted in its belief notwithstanding the decision of the District Court to the same effect *(4 Fed. (2d) 604)*, which was rendered on February 13, 1925, and which merely followed the decision of the Court of Appeals for the Second Circuit in *Seaman v. Bowers, 297 Fed. 371*, which was decided March 17, 1924. Because of the Treasury Department's persistent claim that if it assessed a tax in time it could collect it at any time, and because it did not abandon this idea until the decision of this Court in the *Bowers case*, rendered February 21, 1927, a multitude of cases existed in which it had assessed the tax but did not attempt to collect it until after the statute of limitations had barred its collection. The Treasury Department's agents, however, honestly believed that because the assessment was made in time the collection of the tax was not barred and they so informed taxpayers and at the same time told taxpayers that unless waivers were signed they would proceed to make immediate collection. Of course, they had then no right under the law to make col-

lection but they honestly believed they did have this right and that they were refraining from doing that which they had a legal right to do in consideration of waivers executed by taxpayers. Although such waivers were executed after the statute of limitations had run on the right to collect the tax, yet neither party knew it at the time. The collector demanded waivers believing that he had a right to collect the tax. He had in one hand a distraint warrant with which he could wreck the taxpayer's business unless waivers were given. In cases where the taxpayer was unable to pay there was nothing for him to do but execute the waiver demanded.

The Statute of Limitations Contained in the Revenue Acts Not Only Bars the Remedy But Also Extinguishes the Liability.

Another ground of the decision in the case of *W. P. Brown & Sons Lumber Company*, much relied on by the respondent, is that the statute of limitations contained in the Revenue Acts merely barred the remedy and did not extinguish the liability. If this theory is correct, it is difficult to understand why the taxpayers were allowed to recover in the cases of *New York & Albany Lighterage Company v. Bowers*, 273 U. S. 347; *Russell v. United States*, 278 U. S. 181, and many lower Court decisions. In the supplemental and reply brief filed by the petitioner at the bar this subject is discussed and that discussion is contained therein at pages 10 to 18 and is not repeated here.

To that discussion, however, we would add that it was generally considered by the bar that the statutes of limitation contained in the Revenue Acts not only barred the remedy but also extinguished the liability, and as pointed

out in the petitioner's supplemental and reply brief it was so decided in *Bashara v. Hopkins, 290 Fed. 592.* It was also so decided in *Citizens Bank v. Miller Link Lumber Company, 16 Fed. (2d) 163, 164,* and in *John Barth Company v. United States, 27 Fed. (2d) 782, 784* (reversed on other grounds in *279 U. S. 370).* Force is lent to this view by the statute prohibiting an injunction against the collection of any internal revenue tax.

The statute of limitations contained in the Revenue Acts did not effectually bar the remedy. If the Collector made up his mind to collect the tax after the statute of limitations had run, the taxpayer could not prevent him. The fact that the statute of limitations had run could not be used by the taxpayer to procure an injunction but, as held by this Court in *Graham v. Dupont, 262 U. S. 234,* the taxpayer's remedy was to pay the tax and sue to recover it. The real substance of the statute of limitations contained in *Section 250 (d) of the Revenue Act of 1921* was that while it did not effectually bar the remedy, yet it could be made the basis of an affirmative action to recover the tax paid after the statute had run. This is not the case with statutes of limitation which merely bar the remedy. Such statutes do not form the basis for an affirmative action.

In the case of *Toxaway Mills v. United States, 61 Ct. Cl. 363,* the Court of Claims first advanced the theory that the statute of limitations contained in *Section 250 (d) of the Revenue Act of 1921* merely barred the remedy and did not extinguish the liability. This Court promptly granted a certiorari, and after the enactment of the *Revenue Act of 1926* the case was reversed upon confession of error, but the legislative proceedings surrounding the

enactment of *Section 1106 (a) of the Revenue Act of 1926* show that Congress considered the view expressed by the Court of Claims in the case of *Toxaway Mills* to be unsound.

The Conference Report, presenting the bill to the House, stated in part *(House Report 356, p. 55)*:

> "Amendment 170: This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the remedy and also to extinguish the liability. This amendment is deemed advisable because of an opinion in a recent decision in the Court of Claims *(Toxaway Mills v. United States)*. Although in a case presenting the specific point this opinion very probably would not be followed by the Supreme Court. (See Taft C. J., in *Graham v. Dupont, 262 U. S. 234, 256 and 258.)*"

It is thus manifest that the opinion of the House Conferees was that the view of the Court of Claims was wrong and that the statute of limitations did extinguish the liability and they considered *Section 1106 (a) of the Revenue Act of 1926* to be declaratory of existing law.

When the same section came up in the United States Senate, Senator Reed of Pennsylvania, said:

> "In a recent decision in the Court of Claims *(Toxaway Mills v. U. S.)*, it has been held in substance that after the statute of limitations has run against the collection of a tax the Collector may nevertheless issue his distraint and collect the tax by a distraint, and then if the taxpayer brings suit against the United States to recover it back, he, being the plaintiff, cannot plead the statute of limitations, although the United States would have been barred from a suit for the tax because the statute had run. It is a preposterous result it seems to me, and a very great

hardship to the taxpayer to allow such a condition to continue, and while I do not think we ought to allow even ~~such~~ a possibility that it will not, remain and we ought to correct it now." (C. B. Vol. 6, pt II, p. 353.)

It is, therefore, submitted that the statute of limitations contained in *Section 250 (d) of the Revenue Act of 1921* was intended not only to bar the remedy, but to extinguish the liability.

The Provisions of the Revenue Acts of 1926 and 1924 Dealing with Waivers and the Provisions of the Revenue Act of 1921 Are in Pari Materia and Should Be Considered Together.

In the case of *Joy Floral Company v. Commissioner, 29 Fed. (2d) 865*, the Court quotes as follows from Chief Justice Marshall in *Alexander v. Alexandria, 5 Cranch. 7:*

> "It is to be observed that acts in *pari materia* are to be construed together as forming one act. If, in a subsequent clause of the same act, provisions are introduced, which show the sense in which the legislature employing doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law."

Again the Court quotes the following from *25 R. C. L., p. 1064, Section 288:*

> "If it can be gathered from a subsequent statute in *pari materia* what meaning the legislature attached to the words of a former statute, that will amount to a legislative declaration of its meaning, and will govern the construction of the first statute."

The decision in the *Stange case*, which is now before your Honors for review, and the decision of the Court of Appeals of the District of Columbia in the *Joy Floral Company case* were both considered by the Circuit Court of Appeals for the Seventh Circuit in the case of *Pictorial Printing Company v. Commissioner, 38 Fed. (2d) 563*, and the Court said:

> "For the reasons stated in the said opinion of the Court of Appeals of the District of Columbia, and in the above cited cases in which it was followed, we are of the opinion that the correct rule was there announced, and that the Commissioner takes nothing by consent first entered into after the limitation had expired."

The Court of Claims in its opinion in the case at bar, stated:

> "We think that a waiver of the statute of limitations is a contract, and that even if the statute has run, the moral obligation to pay a tax properly assessed is sufficient to constitute a consideration."

In the case of *White v. Hood Rubber Company, 280 U. S. 253*, this Court said that waivers were not contracts, saying in part:

> "The instruments were nothing more than what they were termed on their face—waivers."

In the article on "*Waivers*", *40 Cyc., at pages 263, 264*, it is said:

> "In the absence of all conduct creating an estoppel, a waiver should be supported by an agreement founded upon a valuable consideration, although a consideration, such as is necessary to support a contract, is not always essential."

Waivers executed before the statute of limitations has run are supported by a consideration consisting of fore-

bearance on the part of the Commissioner to assess or collect the tax, but if the Commissioner's right under the statute to do these things has become lost and extinguished, it is difficult to conceive what consideration there is to support a waiver. Taxes are not debts and if the statutory law which creates them also extinguishes them by efflux of time the law must be read as a whole and not only the remedy but the right being extinguished no moral consideration can be adduced.

Regardless of What May Be the Conclusion As to the Validity of a Waiver Executed After the Statute of Limitations Has Run and Before the Enactment of the Revenue Act of 1924, the Waiver in the Present Case Only Waived Assessment and Did Not Waive Collection.

Unless a waiver of collection can be read into a waiver of assessment and, unless the waiver in the present case can be extended beyond the plain meaning of its words, then the collection of the tax in the case at bar was not authorized by the waiver.

The waiver was on a form drafted by the Treasury Department and presented to the taxpayer to sign. It should be construed strictly against the party drafting it and liberally in favor of the taxpayer.

The reason the waiver did not provide for collection of the tax is probably to be found in the fact that until this Court's decision, affirming the lower Court, in the case of *Bowers v. New York & Albany Lighterage Company, 273 U. S. 347*, the Treasury Department was stubbornly of the opinion that if it assessed a tax in time there was no limitation on its right to collect that tax by suit. Consequently it thought that provisions for collection in waiv-

ers were not necessary. It was clearly mistaken in this unfounded view of the law and in *Bowers v. New York & Albany Lighterage Company,* this Court did not relieve it from the consequences of that mistake. It should not be relieved from the consequences of that mistake in the case at bar by reading the word collection into a waiver when that word is not there and when it was omitted because of a misunderstanding of the law.

There is judicial authority that waivers are not to be construed or extended beyond the fair import of their terms *(Blatchford v. Harris, 115 Ill. App. 160),* and this is particularly true of tax laws which require liberal construction in favor of taxpayers. Then, too, the other rule requiring the construction of an instrument against the party drafting it is also applicable.

CONCLUSION.

In conclusion it is submitted that the terms of the statute must be considered in connection with every waiver.

The statutory provisions contained in the *Revenue Act of 1921* differ from those contained in the *Revenue Acts of 1924 and 1926.*

The provisions of the *Revenue Acts of 1924 and 1926* clearly invalidate waivers given after the statute of limitations had run if the collection of the tax was barred when those acts were enacted.

The *Act of 1921* neither invalidates such waivers in express terms nor does it authorize them in express terms, but it is contended that it should be construed to invali-

date them because (1) the provision in it authorizing waivers is in *pari materia* with similar provisions of the *1924 and 1926 Acts* which indicate the legislative intent to invalidate such waivers; (2) Unlike general statutes of limitation which are to be construed in favor of the Government, the special statutes of limitation contained in taxing acts are to be liberally construed in favor of taxpayers; (3) The statutes of limitation contained in the Revenue Acts were intended to extinguish the liability as well as to bar the remedy, and (4) the circumstances under which such waivers were usually executed are additional reasons why the *1921 Act* should be construed as contended for by the taxpayer.

In any event, it is an elementary rule of law, as stated in the *Article on "Waivers", 40 Cyc., at pages 263, 264,* that, "in the absence of all conduct creating an estoppel a waiver should be supported by an agreement founded upon a valuable consideration".

There is no consideration for a waiver given after the statute of limitations has run. The Commissioner had then no legal right to assess the tax and could refrain from doing nothing which he had a legal right to do. There was no estoppel because there was nothing on which he could have relied to his detriment. On the part of the taxpayer the waiver was a mere gratuity and not supported by any consideration.

Finally, it is submitted that in any event the waiver in the case at bar is insufficient to authorize collection because it did not waive the statute of limitations on collection. It should not be extended beyond its terms and words should not be read into it which are not there. No

excessive hardship can come to the Government from so holding because even where waivers provided for assessment only, if the assessment was made after the enactment of the *Revenue Act of 1924*, that Act allows the Government six years from the date of assessment in which to collect the tax, but this provision does not apply to assessments made prior to the enactment of the 1924 Act. *(Russell v. United States, 278 U. S. 181.)*

All of which is respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 23

CHARLES H. STANGE,

Petitioner,

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF AS AMICI CURIAE ON BEHALF OF FRANK A. VANDERLIP, A. B. HULL, FLINT MILLS AND OTHERS.

WM. E. LEAHY,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 23

CHARLES H. STANGE,

Petitioner,

v.

THE UNITED STATES,

Respondent.

BRIEF OF AMICI CURIAE.

STATEMENT.

This brief of Wm. E. Leahy and Wm. J. Hughes, Jr., as amici curiae, on behalf of Frank A. Vanderlip, A. B. Hull, Flint Mills and others similarly situated is respectfully prayed to be considered in the determination of the issues herein.

POINT I.

Whether the Waiver Herein Extended the Period for Collection Is a Matter, Primarily, of Intention of the Parties Under the Law as It Existed at the Time the Waiver Was Executed.

The waiver herein must be construed, not only from the viewpoint of its legal implications, but also from the common sense viewpoint of what the law was at the time it was executed and what the parties intended it to cover. In other words it must not be distorted to cover a situation which neither party knew existed at the time of its execution. At the time the waiver was signed, November 14, 1922, neither the taxpayer nor the government believed waivers of the period for assessment had anything to do with the waiving of the period for collection. It was not until the decision of this Court in Bowers v. New York & Albany Lighterage Co., 273 U. S. 346, February 21, 1927, that the government realized that not only must the tax be *assessed* within the five-year period but also collected within that period. Prior to that decision the government supposed that if "assessed" within five years, the tax could be collected by distraint, at any time. This supposition was destroyed by this Court's decision that the bar against a "proceeding," erected by Section 250(d), included a "proceeding" by distraint. It was only at this time that waivers under the 1921 Act began to assume importance *from the viewpoint of collection.*

That this was the fact is evident from the office decision of the Bureau of Internal Revenue published in

Cumulative Bulletin I-2 for July to December, 1922 (I. T. 1446, p. 218), covering the very period in which the waiver herein was executed, holding that where a tax was assessed within the statutory period of limitation it could be collected at any time thereafter. The Bureau said that the five-year limitation upon a "suit or proceeding" contained in Sec. 250(d) of the 1921 Act referred "only to judicial proceedings." Hence the tax could be collected by distraint at any time. This view was held continuously by the Bureau until it was overturned by the Court in Bowers v. New York & Albany Lighterage Co., *supra.*

In view of the importance of this question a more extended examination of the situation which existed with reference to waivers under revenue acts prior to the 1921 Act may be of value.

Prior to the Revenue Act of 1921 there was no broad and definite provision of law regarding any restriction on the assessment and collection of income and excess profits taxes for taxable periods prior to 1918. (Bowers v. New York & Albany Lighterage Co., 273 U. S. 346.)

In the Acts of 1909, 1913 and 1916 there was a common provision which placed a limited restriction on the powers of the Commissioner of Internal Revenue to assess and collect taxes. This provision was to the effect that if in the case of erroneous, false or fraudulent returns a discovery of such fact was made within three years of the due date of the return, the tax should be assessed and paid immediately by the taxpayer (1909 Act, Sec. 38, par. 5; 1913 Act, Secs. G, C, par. 6; 1916 Act, Sec. 14a). Other than this restriction there was no limitation on the right and power of the Com-

missioner to collect taxes. The Bureau could collect taxes by suit at any time under these acts, but it was reluctant to proceed in this manner if it could be avoided. Consequently, it was deemed advisable to make some provision for the assessment of taxes which were discovered after the expiration of three years from the due date of the return. (Sol. Op. 92, C. B. 4, p. 325; Sol. Op. 60 and 79, C. B. 3, pp. 295, 302.)

As a result the Bureau devised and sent out to taxpayers a waiver form. This form provided only for assessment of the tax. No provision was made in these waivers for collection of the tax because it was unnecessary. As before noted, there was no limitation on collection. The only object in view was to give the Commissioner the right to assess the tax in the regular manner if such tax was discovered more than three years after the return was due. There was no provision in the Acts of 1909, 1913, 1916 and 1917 for these waivers and they were issued by the Commissioner on his own initiative.

When the Revenue Act of 1921 became law the situation in regard to the assessment and collection of taxes was completely changed. Section 250(d) of that Act provided specifically as to the manner in which taxes should be assessed and collected by a statutory limitation of five years. Provision was also made for waivers and this was as specific as the statutory limitation.

This section of the law, therefore, set up a complete and specific limitation period for those taxable years which theretofore had not been governed by a statute of limitations except in a restricted sense.

The Commissioner no longer had the right to collect

taxes at any time by suit nor the right to assess and collect taxes in the ordinary manner if discovery of the taxes was not made within a certain time. The law prescribed that assessment and collection must be made within a definite period and this was irrespective of the method pursued, whether the tax was first assessed in the ordinary manner and then collected or collected by suit without assessment.

After the passage of the Revenue Act of 1921 the Bureau made no immediate change in the waiver form. This is evident from a reading of the waiver herein, given November, 1922. The Bureau apparently still believed that a waiver of the period for assessment was all that was necessary, assuming, as it did, that distraint could be made at any time.

That a waiver of "assessment" was not considered to have anything to do with "collection" is evident from Commissioner's Mimeograph 3085 (C. B. II-1, p. 174). It is stated therein that assessment waivers on file for the year 1917 would be held to expire on April 1, 1924. There is no statement in the mimeograph concerning collection because as above stated the Bureau believed there was no restriction on this Act where assessment was properly made.

It seems clear, therefore, that it was not until after the decision of this Court in the case of the New York & Albany Lighterage Co., *supra,* in February, 1927, that the Commissioner advanced the theory that collection of the tax was implied in a waiver which provided only for assessment of the tax.

This conclusion is substantiated by a reference to the case of Toxaway Mills v. U. S., decided March 14, 1927 (273 U. S. 781). In that case there was a waiver

which provided only for assessment given prior to the Revenue Act of 1921, and upon which waiver the Commissioner based his right to collect the tax. The Court of Claims decided against the taxpayer and this Court granted certiorari. Immediately after the decision of this Court in the New York & Albany Lighterage Co. case the Solicitor General of the United States confessed error. This indicates that up until this time the Commissioner had not evolved the theory, or at least placed no reliance in it, that collection was implied in an assessment waiver. If this theory had been born at that time it is more than likely that it would have been advanced in the Toxaway Mills case as it was as applicable to that case as to the present case.

Summing up, therefore, the following may be gleaned from the situation as it existed in November, 1922, when the waiver was executed:

(1) The Commissioner believed that if assessment was made within the five-year period, collection could be made at any time thereafter;

(2) The taxpayer believed that he was waiving the period of *assessment only* for the reason that both the Commissioner and himself believed, *at that time,* that a tax assessed *within* the period could be collected *after* the period by distraint;

(3) The waiver was prepared by the Commissioner to suit his own purposes. If the Commissioner had intended it to cover collection he could easily have inserted the word "collection" in the context. Neither party inserted "collection" because neither party deemed it necessary. One

party, i.e., the Government, now prays that it be read into the word "assessment."

It follows that the attempt now made to spell out a waiver of the period of collection from a waiver of the period of assessment, when neither party had any notion that the waiver referred to collection, at the time it was executed, is an attempt on the part of the government to repair, at this late date (it was unthought of even at the time error was confessed in the Toxaway Mills case, *supra*, in the year 1927) the mistake which it only discovered upon the decision of the New York & Albany Lighterage Co. case, in February, 1927.

It amounts to the contention that because the waiver of "assessment" now turns out in the light of the New York & Albany Lighterage Co. decision, to be unproductive to the government, it must now be construed to waive "collection."

It is sufficient to answer that not only does the waiver say nothing about collection on its face, but that the idea itself was absent from the minds of both parties at the time of its execution.

POINT II.

The Decision of the Court of Claims.

The Court of Claims held the waiver authorized collection on the ground that if it did not, its execution was an idle performance. Aside from the doubtful logic of such a conclusion, it is clear, from a reading of Point I, herein, that *at the time the waiver was*

executed, it had a function entirely distinct from extending the time for collection. At that time, in the minds of both parties, it extended the period for *assessment,* which, in turn, under the Commissioner's then construction of the law, enabled him to distrain at any time thereafter. It is therefore no argument to contend that it *must* have been intended to cover collection, otherwise it would have had no reason for existence. Its reason for existence was exactly what it attempted to do on its face, namely, extend the time for assessment which the Commissioner regarded as sufficient for his purposes on that occasion.

To charge both parties, in doing an act in 1922, with knowledge of an interpretation of the law only arrived at by this Court in 1927, and to alter the plain intention not only of one, but of both parties, on the ground that, as the law was subsequently discovered to be (five years later), the waiver would be unhelpful to the government, is, we submit, in accordance with no rule of legal construction.

The statement therefore by the Court of Claims

> "Whether plaintiff so intended or not, he and his attorneys must have known that the Commissioner accepted the waiver believing that it authorized the collection of any tax properly assessed,"

is again of doubtful logic, for obviously the belief of the Commissioner is no ground for altering the plain meaning of the waiver. There is, however, a sufficient answer: the taxpayer believed, in signing the waiver, that when he authorized assessment, *the law, not the waiver of the taxpayer,* authorized distraint. This belief he subsequently discovered to be erroneous, upon

the decision of this Court of the New York & Albany Lighterage Co. case, *supra*. The waiver then became a nullity. This was a far different situation from executing a waiver freely and with full knowledge that the act itself subjected the taxpayer to additional liability.

CONCLUSION.

The judgment below should be reversed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 23.—October Term, 1930.

Charles H. Stange, Petitioner,
vs.
The United States.
} On Writ of Certiorari to the Court of Claims.

[January 5, 1931.]

Mr. Justice Brandeis delivered the opinion of the Court.

In February, 1915, Stange made a return of taxable income for the year 1914, under the Revenue Act of October 3, 1913, c. 16, 38 Stat. 114, and paid the tax assessed thereon. In February, 1924, the Commissioner of Internal Revenue made a deficiency assessment. Proceedings for collection were instituted in March, 1925. In order to avoid distraint, Stange paid the amount assessed with interest and duly made claim for a refund on the ground that the return made in 1915 had included all the income taxable. Upon the rejection of this claim, he filed a supplementary claim for a refund on the ground that the collection of the additional tax had been barred by the statute of limitations contained in § 250 (d) of the Revenue Act of November 23, 1921, c. 136, 42 Stat. 227, 265. After the lapse of six months without a determination by the Commissioner, he brought this suit in the Court of Claims to recover the money so paid. There he urged both contentions. In answer to the latter, the Government insisted that the statute had been waived by a written agreement signed by Stange in November, 1922, and by the Commissioner in March, 1923. The trial court entered judgment for the United States. 68 Ct. Cl. 395. This Court granted a writ of certiorari, limited "to the questions involving the validity and effect of the waiver of the statute of limitations." 281 U. S. 707.

No constitutional question is presented. Whether the petitioner is entitled to recover depends upon the construction and effect of § 250 (d) and of the written agreement called the waiver. That section provides:

"The amount of income, excess-profits, or war-profits taxes due . . . under any return made . . . under prior income, excess-profits or war-profits tax Acts, or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: . . ." 42 Stat. 265.

The waiver provides:

"C. H. Stange, of Merrill, Wisconsin, in consideration of the assurance given him by officials of the Income Tax Unit of the Bureau of Internal Revenue that his liability for all Federal taxes imposed by the act of Congress approved October 3, 1913, . . . on his net income received from all sources in the year ended December 31, 1914, . . shall not be determined except after deliberate, intensive, and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered. . . ."

First. It is contended that the waiver was of no effect because executed more than five years after the filing of the return.[1] The argument is that to give effect to a waiver executed after the expiration of the period of limitation would give to the statute a retroactive effect, which Congress cannot be presumed to have intended. There was no lack of power. Prior to the 1921 Act no legislation barred the enforcement of the liability for a tax under

[1]On this question, there has been conflict in the lower federal courts. See, sustaining the validity of such waivers, Stange *v.* United States, 68 Ct. Cls. 395; W. P. Brown & Sons Lumber Co. *v.* Commissioner, 38 F. (2d) 425 (C. C. A. 6th); Sabin *v.* United States, 44 F. (2d) 70 (Ct. Cls.). Denying validity: Joy Floral Co. *v.* Commissioner, 29 F. (2d) 865 (Ct. App. D. C.) (same question under § 278 (c) of the Act of 1924, c. 234, 43 Stat. 253, 300); Spear & Co. *v.* Heiner, 34 F. (2d) 795; Pictorial Printing Co. *v.* Commissioner, 38 F. (2d) 563 (C. C. A. 7th); Columbia Iron Works *v.* Brock, 38 F. (2d) 816; Chicago Railway Equipment Co. *v.* Commissioner, 39 F. (2d) 378 (C. C. A. 7th) (both under the 1924 Act); Wetherell Bros. Co. *v.* White, D. Mass., decided December 3, 1930, U. S. Daily, December 30, 1930, p. 3291 (under § 278 (c) of the 1926 Act, c. 27, 44 Stat. 9, 59).

the Act of 1913. Taxes duly assessed could be collected at any time by suit. There was a three-year limitation on assessment[2] (Section II (E), 38 Stat. 169), which if duly made might be followed by distraint. But there was no limitation upon the time within which the tax liability could be enforced by suit without a prior assessment.[3] The 1921 Act was the first to interpose a limitation upon the right of the Government to enforce a tax liability already accrued.[4] It barred collection in any manner after five years only in case no waiver was given. Congress must have intended that a waiver should be operative even though before the passage of the Act, five years had elapsed from the time the return had been filed. Among the earlier revenue acts referred to in § 250 (d) was that of 1909, the returns under which were required to be filed more than ten years prior to the passage of the 1921 Act. Section 38, Third, 36 Stat. 114. And returns under the Revenue Act of 1913 were required to be filed more than six years before the passage of the 1921 Act. Section II (D), 38 Stat. 168. The consent clause in § 250 (d) deals broadly with all assessments and collections under past and future acts, and there is no indication of an intention to confine it to those few cases under the early revenue acts in which no return had been filed or a so-called common law waiver had been given prior to 1921. Unless it is to be rendered practically meaningless as applied to tax returns under these earlier acts, it must be construed to permit the execution of waivers after the period of five years. Moreover, there is the analogy of the rule that private debts barred by the statute of

[2]There was doubt whether this provision required the Commissioner both to discover the error in the return and to make an additional assessment, or merely to make discovery, within the three years. See Aiken *v.* Burnet, No. 69, decided this day, note 2; Brown & Sons Lumber Co. *v.* Burnet, No. 115, decided this day, note 2.

[3]Compare United States *v.* Nashville, C. & St. L. Ry., 249 Fed. 678; United States *v.* Ayer, 12 F. (2d) 194; United States *v.* Kelley, 24 F. (2d) 234; United States *v.* Greenfield Tap & Die Corp., 27 F. (2d) 933.

[4]The provisions in § 250 (d) of the Revenue Act of 1918 (40 Stat. 1057, 1083) were not in terms retroactive and applied only to taxes assessed under that Act. Compare Bowers *v.* N. Y. & Albany Lighterage Co., 273 U. S. 346, 350; Florsheim Bros. Co. *v.* United States, 280 U. S. 453, 459, note 5. Even after the Act of 1921 suit might be brought, within the limitation period, though no assessment had been made. See Revenue Act of 1924, c. 234, § 278 (d), 43 Stat. 253, 300.

limitations may be effectively revived, after the bar has fallen, by a new promise without new consideration. Williston, Contracts, §§ 160-84.

Second. It is contended that the so-called waiver was inoperative because its provisions did not conform to § 250 (d) of the Revenue Act of 1921, in that it waived "any and all statutory limitations as to the time within which assessments based upon such liability may be entered," but did not in terms refer to the "determination" or "collection" of the tax.[5] The argument is that Congress had, in respect to a waiver, prescribed an exact and mandatory procedure under which the Commissioner was authorized to defer action only if the taxpayer expressly waived the limitations on all three steps, determination, assessment, and collection,—reliance being had on the use of the conjunctive "and" in the section; that the statutory authority given the Commissioner to consent to a later performance of these three steps did not imply a like authority as to any one of them; that under § 250 (d) the periods within which both assessment and collection must be made, run concurrently five years from the filing of the return; and that nothing was accomplished by consenting to the assessment, since the assent to a later collection was withheld.

We are of the opinion that the validity of a waiver under § 250 (d) was not conditioned on the precise use of the three words therein mentioned. As pointed out in *Florsheim Bros., etc.* v. *United States,* 280 U. S. 453, 466, a waiver is not a contract, and the provision requiring the Commissioner's signature was inserted for purely administrative purposes and not to convert into a contract what is essentially a voluntary, unilateral waiver of a defense by the taxpayer. The ambit of the Commissioner's authority may be in many respects limited by the statute, *Florsheim Bros., etc.* v. *United States, supra,* at 464, but no reason appears why it was

[5]On this question, the Government has uniformly prevailed below. Stange *v.* United States, 68 Ct. Cls. 395; Sabin *v.* United States, 44 F. (2d) 70 (Ct. Cls.); Columbia Iron Works *v.* Brock, 38 F. (2d) 816; Washington Coal & Coke Co. *v.* Heiner, 42 F. (2d) 681; Solomon *v.* Heiner, 43 F. (2d) 592; Crowell Elevator Co. *v.* Allen, 43 F. (2d) 772; see, also, Watt & Holmes Hardware Co. *v.* Commissioner, 8 B. T. A. 372; Sunshine Cloak & Suit Co. *v.* Commissioner, 10 B. T. A. 971 (under § 278 (c) of 1924 and 1926 Acts); Lutcher & Moore, etc. Co. *v.* Commissioner, 19 B. T. A. 887; *cf.* Roy & Titcomb, Inc. *v.* United States, 69 Ct. Cls. 614.

essential that specific reference be made to the period for collection, or why he could not, with the taxpayer's consent, employ one word instead of three to secure the desired result. The waiver, in terms, was executed by the taxpayer in order "that his liability . . . might be determined" only after intensive and thorough reconsideration by the Commissioner. The parties cannot have intended to have the amount of the tax ascertained and to leave the taxpayer free to pay it or not. They clearly contemplated the entire procedure necessary to determination and collection of the tax. This does not mean that the distinctions between assessment and collection were to be disregarded, but merely that the employment of a single term comprehended both steps.

In November, 1922, both parties understood that the tax would be assessed and collected after a proper consideration of the taxpayer's objections to any additional assessment. To secure sufficient time for this purpose, the so-called waiver was executed. The failure to insert in the written consent words expressly waiving the statutory limitation upon collection, is explained by the belief prevailing prior to the decision in *Bowers* v. *N. Y. & Albany Lighterage Company*, 273 U. S. 346, that distraint, the common method for coërcing payment, was possible even when the statutory period for collection by suit had expired. That the parties at the time may have believed that collection was possible independent of any waiver, does not make less effective the instrument given for the purpose of tolling the limitation on the ultimate determination and collection of the tax. It must be assumed that an effective and not a futile act was intended.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.